Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THEODORE L. LEBLANC,
Petitioner,

v.

GREAT AMERICAN INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

WALTER M. PHILLIPS, JR.
Counsel of Record
LELAND I. KELLNER
PHILLIPS AND PHELAN
SUITE 1600
THE NORTH AMERICAN
BUILDING
121 SOUTH BROAD STREET
PHILADELPHIA, PA 19107
(215) 546-0500

Attorneys for Petitioner
Theodore L. LeBlanc

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QUESTIONS PRESENTED

1. Is a plaintiff in an age discrimination case, who can prove a prima facie case of discrimination and can present evidence discrediting the employer's proffered reason, but does not offer direct evidence of discriminatory animus, entitled to have his or her claim decided by a jury?

2. Is a disparate impact theory of liability available to a plaintiff in an age discrimination case, and should the Court of Appeals have considered such a theory in this case?

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No. _____

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THEODORE L. LEBLANC,
Petitioner,

v.

GREAT AMERICAN INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Theodore L. LeBlanc ("LeBlanc" or "Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 6 F.3d 836 (1st Cir. 1993). (App. 1a-30a).[1] The ruling of the District Court was made from the bench on November 2, 1992 and is set forth in the Appendix. (App. 36a-39a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 1993 (App. 33a), and a petition for rehearing by the panel was denied on October 25, 1993 (App. 34a-35a). The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title 29, United States Code § 623(a)(1) provides:

> It shall be unlawful for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

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[1] Pages in the Appendix are cited as "App." and page number; references to the joint Appendix filed with the First Circuit Court of Appeals are by "A" and their page number.

> employment, because of such individual's age....

STATEMENT OF THE CASE

Petitioner Theodore L. LeBlanc was an Agency Operations Representative ("AOR") for Respondent Great American Insurance Company ("Great American" or "Respondent"), assigned to eastern Massachusetts, when, on October 19, 1990, he was advised that his job was being eliminated and that he was being terminated that day. (A123-124). LeBlanc was fifty-nine years old and one day short of his tenth anniversary with the company. (A133).

Petitioner first filed a charge of age discrimination with the Massachusetts Commission Against Discrimination ("MCAD") in April 1991 and later filed this action in the District of Massachusetts pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §623, et seq. ("ADEA"). Jurisdiction was premised upon 28 U.S.C. §1331 and 29 U.S.C. §626(c).

Petitioner's performance was never an issue, as LeBlanc had consistently performed well as an AOR selling Great American's various commercial lines of insurance. (A122-123). In response to Petitioner's age discrimination complaint, Great American offered as its reason for terminating Petitioner that eliminating LeBlanc's position was part of a reduction in the company's Northeast Zone work force of salaried exempt employees. (App. 42a; A8). According to Great American, in August 1990, Northeast Zone president Al Conte ("Conte") was directed by the home office in Cincinnati, Ohio to find ways to reduce his budget, which was approximately $20 million. (A58; 146). The number of salaried exempt employees in the Northeast Zone in 1990 was 212, including thirty-one AORs as of October.

(A130-131; 217). In addition to Petitioner, two others (an underwriter and a branch office manager) were also laid off because their jobs were being eliminated, and two vacant positions went unfilled. (A59-60). With respect to LeBlanc, Conte decided that since Massachusetts was particularly unprofitable for Great American, he would eliminate one of the two AOR positions in that state; and because Petitioner's AOR colleague in Massachusetts, Charles DeMartino, had more experience than Petitioner with the Massachusetts market and so could better adjust emergency claims, Petitioner would be terminated. (A60-61; 260-262). At the time, LeBlanc was the oldest of the thirty-one AORs in the Northeast Zone and the only one whose position was eliminated from January 1, 1989 through the litigation in this case. (A130-133).

Respondent filed a motion for summary judgment at the close of discovery contending that Petitioner, in addition to not being able to make out a prima facie case of discrimination, could offer no credible evidence showing that Great American's articulated reason for terminating LeBlanc was pretextual for age discrimination. (A8-10). In response, Petitioner offered substantial evidence disputing Great American's proffered reason, consisting of deposition testimony of Great American management as well as company documents showing that the reduction in force in October 1990 was anything but a bona fide reduction in force, that Massachusetts was no more unprofitable than other states and profit centers in the Northeast Zone and, in fact, may have been actually profitable, and that Northeast Zone president Conte dissembled in his explanation of the careful and thoughtful process he claimed he engaged in before arriving at the decision to terminate LeBlanc. Petitioner also showed that not only was he the oldest AOR

at the time of his layoff and the only one laid off after January 1, 1989, but that most of the Northeast Zone AORs in Great American's employ during this period were not just years but decades younger than he.

As to the purported reduction in force, the evidence was undisputed that there were a total of only four positions eliminated in the Northeast Zone in 1990, including the three in October 1990, yet the number of salaried exempt employees -- 212 -- which comprised the Northeast Zone payroll in 1990 was exactly the same number employed in 1991. (A217). In addition, in the months leading up to Petitioner's termination, Respondent created ten new AOR positions in the Northeast Zone and hired or assigned to nine of these positions individuals under the age of thirty, none of whom were laid off as part of the staff cuts taken shortly thereafter. (A134-135).

Petitioner countered Great American's contention that it wanted to reduce its presence in Massachusetts because it was unprofitable to sell insurance there by pointing to company records showing that for the period from 1987 through 1991, Massachusetts was the only state of the four largest producing states in the Northeast Zone showing a profit each year. (A198-200). Respondent disputed this, contending that the records relied on by Petitioner were not as accurate as other records which Great American maintained showing losses in Massachusetts.[2] Yet even

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[2] LeBlanc pointed to the company's Gross Accident Year Analysis Report while Great American used the Effective Accident Year Report. See App. 22a-23a for Court of Appeals' discussion of this issue.

Great American's own witnesses conceded that the records relied on by Petitioner showed at the very least the likelihood of future profitability in Massachusetts. (A164-166). They also showed, and it was not disputed, that insurance sold by Respondent in Massachusetts in 1991, the year after LeBlanc was terminated, increased substantially from the previous year (from almost $20 million in premiums to over $23 million).[3] (A200).

Further, Petitioner offered proof, and it too was not disputed, that in other states and branch offices within the Northeast Zone huge losses were incurred in 1990 - $4.5 million by the New Jersey office and $3.8 million by the New England office. (A227, 231). However, instead of laying off AORs, these offices were actually adding new AORs that year, as seven of the ten new AOR positions went to the New Jersey and New England (Windsor[4]) offices. (A135). Even the Lancaster, Pennsylvania branch office, the office to which LeBlanc reported as an AOR in Massachusetts, realized a loss in 1990 of $3.7 million (A233), yet it too was given a new AOR position in February 1991, just several months after LeBlanc's

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[3] Petitioner also asserted and pointed to records showing that his own individual performance as a commercial lines AOR was profitable during his time in Massachusetts. (A123).

[4] The New England office is referred to by Great American in answers to interrogatories as "Windsor", referring to Windsor, Connecticut, which was also the Northeast Zone headquarters. (A135).

departure; and Great American filled it, not by recalling LeBlanc, but with a twenty-seven year old (Anne Rossi). (A135).

With respect to how the decision was reached that LeBlanc was to be the only AOR laid off, Conte explained that he formed a committee to examine the Northeast Zone to determine where cuts should be made and that he also consulted branch managers before making a final decision. (A58-59; 181-182). However, one of Conte's vice-presidents whom Conte identified as a member of the committee, Joseph Klimas, testified at his deposition, as did LeBlanc's own branch manager, Bruce Rutherford, that they participated in no discussions with Conte with respect to staff cuts in the Northeast Zone and were informed of the decision to eliminate LeBlanc's position and terminate him only after it had been made when they were directed by Conte to go to Massachusetts to give Petitioner the news.[5] (A170-174; 184-186).

Finally, Petitioner offered the report of an expert statistician, Dr. George Cobb ("Cobb"), a Mount Holyoke College professor of mathematics and statistics with excellent credentials and considerable experience both testifying and consulting as a statistician in employment discrimination cases. (A192-196). Cobb examined Great American's data for salaried exempt employees in the Northeast Zone for the three years from 1989 through 1991 and applied several statistical methods of analysis before reaching the

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[5] Respondent offered no affidavits from other members of this committee or from other branch officers to support Conte's testimony and refute this testimony.

conclusions he did. (A214). It was Cobb's conclusion, applying recognized statistical theory, that the decision to eliminate LeBlanc's position "could not be reasonably regarded as age-neutral in its effect" (A220); that for 1989 and 1990 "there is a huge difference in average age between the salaried exempt employees whose jobs were eliminated and those whose positions continued" (A221); that for the entire three year period "the pattern of age differences is too large and consistent to be regarded as simply the result of chance variation" (A221); and that, overall, the data he examined showed "compelling evidence of age discrimination against older employees." (A221).

In its oral ruling from the bench, the District Court addressed only Cobb's report and held that it was "flawed with the fallacy of post hoc ergo propter hoc reasoning; that is, after this, therefore, on account of this." (App. 38a). The court accepted some of Cobb's conclusions but went on to rule that as a matter of law his report did not make out a *prima facie* case of age discrimination.[6] (App. 38a). The

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[6] The Court of Appeals also was troubled as to whether Petitioner made out a prima facie case of age discrimination, although that court's concern was that the AOR position held by LeBlanc may not have been similar to other AOR positions within the Northeast Zone where substantially younger persons were not laid off. (App. 17a). This was an argument that was not advanced by Great American, and there certainly was nothing in the record to suggest that Northeast Zone AOR positions differed from place to place. Moreover, the District Court made a finding that the other AORs in the Northeast Zone held "similar positions" as LeBlanc's. (App. 38a).

District Court also ruled that the statistical evidence was inadequate as a matter of law "to get behind that ostensibly neutral exposition of the reason for the discharge" (App. 39a) and thus granted Respondent's motion for summary judgment.

On appeal, the Court of Appeals went beyond Cobb's report and analyzed in considerable detail the factual contentions of both parties, siding with Respondent with respect to each and every disputed issue of fact and the inferences to be drawn therefrom. Thus, the court found that the reduction in force could be bona fide even if only a few people were laid off (App. 20a); that Petitioner's measure of Great American's profitability in Massachusetts was not as reliable as the measure offered by the Respondent (App. 22a-23a); that the hiring of ten new younger AORs elsewhere in the Northeast Zone prior to terminating LeBlanc was not connected to the decision to terminate LeBlanc (App. 21a); that criticizing Conte's questionable assertion that he had consulted with others before making a decision to terminate LeBlanc was a personnel matter and not the court's business (App. 25a), and that Cobb's report was flawed for several reasons, none of which had been mentioned by the District Court. (App. 27a-29a).

In concluding that Petitioner had failed to present sufficient evidence to withstand summary judgment, the Court of Appeals also pointed to the fact that Conte, who made the decision to terminate LeBlanc, was approximately the same age as Petitioner, that Petitioner's duties were taken over by someone of similar age (although a thirty year old woman -- Anne Daley -- was shortly thereafter assigned to perform many of these responsibilities) (A201-209) and that Conte had been the one who had approved the transfer of LeBlanc to Massachusetts from Maryland with a substantial

pay increase less than two years before laying him off, although this was hardly doing Petitioner a favor if, as Conte testified, Great American had been suffering financially in Massachusetts even prior to LeBlanc's transfer (A176-177), which was the ostensible reason Petitioner was terminated. Petitioner submits that while these facts may be helpful to Respondent, they really do no more than add to the dispute over Great American's intent and do nothing to validate the discredited reason proffered by Respondent for its decision to terminate LeBlanc.

In denying Petitioner the right to have his case submitted to a jury as the factfinder and awarding summary judgment in Respondent's favor, both the Court of Appeals and the District Court clearly followed the First Circuit's long-standing but no longer viable "pretext-plus" rule, which requires a plaintiff in an employment discrimination case to present independent evidence of discriminatory animus in addition to proving both a prima facie case and that the employer's proffered reason was pretextual.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

Review of this case is vitally important to the enforcement of the nation's anti-discrimination laws. For years, the courts of appeals have split over the issue of whether a plaintiff in a disparate treatment employment discrimination case, in order to withstand a motion for summary judgment or to obtain a verdict in his or her favor, must present proof beyond a prima facie case of discrimination and that which shows the employer's

proffered reasons to be pretextual. Those circuits which require additional evidence of age animus follow what is commonly known as the "pretext-plus" rule, while those circuits which hold that a showing of pretext along with proof of a prima facie case of discrimination is enough for a plaintiff to prevail follow what is often referred to as the "pretext-only" rule.

Last term, in St. Mary's Honor Ctr. v. Hicks, ___ U.S. ___, 113 S. Ct. 2742 (1993), this Court held that a jury's rejection of the employer's proffered reason for its adverse employment action would permit, but not mandate, it to infer an additional finding of intentional discrimination. Id. at 2749. This holding should have put to rest the conflict between the circuits and made it clear to those following the "pretext-plus" rule that it was no longer good law to do so.

However, since Hicks, there have been several conflicting decisions by courts of appeals and even among panels within circuits as to whether this rule is still valid. Although not specifically articulated by the court, the First Circuit clearly applied the "pretext-plus" rule in reaching the result it did in this case, given the strong evidence of pretext presented by Petitioner buttressed by statistical evidence of discrimination.

Resolution by this Court of this issue is critical, since it greatly affects the issue in all employment discrimination cases as to how much proof a plaintiff must present in order to prove intentional discrimination. In today's world where employers have become increasingly more sophisticated, requiring an employee to discover and present direct evidence of discrimination in order to prove his or her case, a virtually impossible task for most plaintiffs, was not Congress' intent when it passed employment discrimination laws several decades ago, nor is it what this Court has

required. Accordingly, the Court should make it crystal clear that a plaintiff can withstand summary judgment once he or she has proven a prima facie case of discrimination and offered credible evidence that shows the employer's proffered reason to be pretextual, without more.

In addition, or alternatively, the Court should take this opportunity to finally address the still unresolved issue of whether a plaintiff may prove age discrimination under a disparate impact theory. Even assuming that Petitioner's statistical evidence did not quite measure up for the purpose of showing a particular employment decision to be pretextual, that same proof easily met the standard required of statistical proof under a disparate impact theory.

II. THE "PRETEXT-PLUS" RULE IS NO LONGER VALID, YET IT STILL CREATES CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS OF APPEALS AND IT WRONGLY DENIED PETITIONER IN THIS CASE THE OPPORTUNITY TO HAVE HIS CLAIM OF AGE DISCRIMINATION CONSIDERED BY A JURY.

For over twenty years, the rule recognized by all federal courts for proving discrimination in an employment discrimination case where there is no direct evidence of discriminatory motive is the shifting burden of proof or production framework established by this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). However, for the past decade, courts have been split with respect to whether, under this framework, the plaintiff must prove in the third step of that process only that

the employer's proffered reasons for its adverse employment decision is pretextual, or that it was a pretext for discrimination, which would require additional evidence of discriminatory animus. The rule that the plaintiff need only prove that the employer's reason is pretextual, i.e., not to be believed, is known as the "pretext-only" rule, and the rule which requires a plaintiff to show evidence of discriminatory motive in addition to pretext is referred to as the "pretext-plus" rule. The split among the courts of appeals prior to Hicks was such that the Second, Third, Eighth, Ninth, Tenth and District of Columbia circuits adhered to the "pretext only" rule[7], and the First, Fourth, Seventh and Eleventh circuits followed the "pretext-plus" rule[8].

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[7] **Second Circuit**: Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988); **Third Circuit**: Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir.) (en banc), cert. dismissed, 483 U.S. 1052 (1987); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir.) cert. denied, 469 U.S. 1087 (1984); **Eighth Circuit**: McDissi v. Valmont Indus., 856 F.2d 1054, 1059 (8th Cir. 1988); **Ninth Circuit**: Lowe v. Monrovia, 775 F.2d 998 (9th Cir. 1985), modified, 784 F.2d 1407 (1986); Perez v. Curcio, 841 F.2d 255, 257 (9th Cir. 1988); **Tenth Circuit**: Pitre v. Western Elec. Co., 843 F.2d 1262, 1266 (10th Cir. 1988); **D.C. Circuit**: Bishopp v. Dist. of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986).

[8] **First Circuit**: Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1117 (1st Cir. 1993); Mesnick v.

In Hicks, this Court accepted review of a Title VII employment discrimination case to determine whether a jury, upon finding that the employer's proffered reason is pretextual, is mandated or merely permitted to make the ultimate finding of intentional discrimination, another issue that had split the courts. The Court resolved that issue by holding that the factfinder is permitted, but not required, to find intentional discrimination if it concludes that the employer's proffered reason is pretextual. In reaching this result, the Court stated:

> The factfinder's disbelief of the reasons put forth by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and

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General Elec. Co., 950 F.2d 816, 823-24 (1st Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct 2965 (1992); **Fourth Circuit**: Duke v. Uniroyal, Inc., 928 F.2d 1413, 1417 (4th Cir. 1991); **Seventh Circuit**: Beard v. Whitley County REMC, 840 F.2d 405, 411 (7th Cir. 1988); **Eleventh Circuit**: Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983).

> the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required...."

Id. at 2749 (quoting Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 493 (8th Cir. 1992)) (second emphasis added) (footnote omitted) (alteration in original). The Court, in explaining its decision, reaffirmed earlier rulings to the same effect, including its decision in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), which held that one method the plaintiff can use to meet his or her burden of showing that the employer's reason is a pretext for discrimination involves showing that its "proffered explanation is unworthy of credence". Id. at 256.

However, in a passage later in the majority opinion in Hicks, the Court explained that "pretext" means "pretext for discrimination" and stated, "[b]ut a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." Id. at 2752. In an effort to respond to the dissent's suggestion that Burdine was in effect being overruled by this language in Hicks, the majority went on to say that Burdine's references to pretext as being "unworthy of credence" should be understood to refer to "pretext for discrimination". Id. Perhaps as a result of these somewhat contradictory signals, the issue of what the plaintiff must show in the third step of the McDonnell Douglas framework has remained in a state of conflict among the lower courts. After Hicks, those circuits which had adopted the "pretext-only" rule prior to Hicks continued for the most part to follow it, while those courts which had adhered to the

"pretext-plus" rule prior to Hicks mostly remained committed to it afterward; and two circuits modified their position somewhat.

The Fifth circuit was not moved at all by Hicks and continues to require a plaintiff to present specific evidence of age animus in addition to showing pretext. Thus, a panel in that circuit recently upheld the entry of summary judgment on behalf of the employer in Bodenheimer v. PPG Indus., 5 F.3d 955 (5th Cir. 1993), stating, "[o]nce the employer had met its burden of production, the plaintiff's burden of persuasion then arises and he must prove that the proffered reasons are not just pretexts but pretexts for age discrimination." Id. at 957. The court even added that this Court in Hicks had "put the issue to bed" and cleared up the confusion as to how much a plaintiff must prove in the third step of the McDonnell Douglas process. Id. Consistent with this result is a decision reached by another panel in the Fifth Circuit in Barrow v. New Orleans Steamship Ass'n, 1994 U.S. App. LEXIS 14 (5th Cir. Jan. 3, 1994) (entry of summary judgment in favor of employer upheld due to plaintiff's failure to present evidence not only that the employer's proffered reason was false but also that age discrimination was the real reason behind the employer's action).

Apparently influenced in this direction by Hicks is the Tenth Circuit, which had previously followed the "pretext-only" rule[9], but now appears to have adopted a "pretext-plus" approach, as seen in a recent case where that court

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[9] See Pitre v. Western Elec. Co., 843 F.2d 1262, 1266 (10th Cir. 1988).

held, "[t]hus, the court concluded [in Hicks], the plaintiff cannot simply prove that the employer's proffered reasons for its action are false, but must offer evidence that the action was actually the result of unlawful discrimination." Card v. Hercules, Inc., 1993 U.S. App. LEXIS 21631, at *6 (10th Cir. Aug. 19, 1993)[10] (citation omitted).

On the other hand, in the Ninth Circuit, which has always followed the "pretext-only" rule, a district court's grant of summary judgment was reversed in Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1993), where the court held:

> Because, as St. Mary's recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine

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[10] This order and judgment has no precedential value and should not be cited, or used by any court within the tenth circuit, except for purposes of establishing the doctrine of the law of the case, re judicata, or collateral estoppel. 10th Cir. R. 36.3. For purposes of this Petition, this citation is offered not to show established precedent in the circuit, but merely to demonstrate the most current interpretation of law by the court of appeals.

> issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment.

Id. at 1433.[11] Two circuits that have modified their stance since Hicks to be more in accord with the "pretext-only" rule are the Fourth and Eleventh circuits. Thus, whereas the Fourth Circuit prior to Hicks had required a plaintiff to show pretext for age discrimination[12], it would now appear that such a burden is not placed on the plaintiff. Mitchell v. Data Gen. Corp., 1993 U.S. App. LEXIS 33421 (4th Cir. Dec. 22, 1993) (plaintiff can ward off summary judgment by showing that there is a general dispute of material fact with respect to the employer's proffered reason for its action and such evidence merges with the evidence showing a prima facie case, all of which can then be

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[11] See also May Sun v. Asian Am. Recovery Servs., 1993 U.S. App. LEXIS 27066 (9th Cir. Sept. 1, 1993) (This disposition is not appropriate for publication and may not be cited to or by the courts of the Ninth Circuit except as provided by 9th Cir. R. 36-3. For purposes of this Petition, this citation is offered not to show established precedent in the circuit, but merely to demonstrate the most current interpretations of law by the court of appeals).

[12] See Duke v. Uniroyal, Inc., 928 F.2d 1413, 1417 (4th Cir. 1991).

considered by the jury in determining whether the ultimate burden of showing intentional discrimination has been met). Similarly, in the Eleventh Circuit, also a "pretext-plus" jurisdiction prior to Hicks[13], a panel has since ruled that a plaintiff need not present evidence over and above that which establishes pretext, stating:

> In order to establish pretext, the plaintiff is not required to introduce evidence beyond that already offered to establish the prima facie case. Evidence already introduced to establish a prima facie case may be considered, and "indeed, there may be cases where the plaintiff's initial evidence combined with effective cross-examination of the defendant will suffice to discredit the defendant's explanation" and establish pretext.

Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, ___, 1993 U.S. App. LEXIS 33079, at *20 (11th Cir. Dec. 21, 1993) (citations omitted) (quoting Burdine, 450 U.S. at 256 n.10).

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[13] See Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983).

There are even conflicts found within a circuit, as reflected in decisions by panels in the Sixth and Seventh circuits. Thus, in McNabola v. Chicago Transit Auth., 63 Empl. Prac. Dec. (CCH) P42,686, U.S. App. LEXIS 31018 (7th Cir. 1993), one panel of the Seventh Circuit reaffirmed its adherence to the "pretext-only" rule and upheld a judgment in favor of the plaintiff by holding that an attack on the employer's proffered reason alone would enable a plaintiff to succeed in meeting his or her ultimate burden of proof. While a separate panel seemed to follow suit -- see Bojda v. Black Dot Graphics, Inc., 1994 U.S. App. LEXIS 117 (7th Cir. Jan. 5, 1994)[14] (purpose of Burdine was to allow plaintiff to prove discrimination solely with evidence of pretext and without having to present any evidence of actual discrimination), another Seventh Circuit panel in Booker v. C.R. Indus., 1993 U.S. App. LEXIS 31886 (7th Cir. Dec. 6, 1993)[15] applied a "pretext-plus" analysis (plaintiff must prove that the employer's stated reasons are pretext for age discrimination, i.e., that the employer's proffered explanations were false and that age was a determining factor in the employer's decision-making process).

Similarly, in the Sixth Circuit, a panel in

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[14] Unpublished order not to be cited per Seventh Circuit Rule 53. For purposes of this Petition, this citation is offered not to show established precedent in the circuit, but merely to demonstrate the most current interpretation of law by the court of appeals.

[15] Refer to Footnote 14.

Roush v. KFC Nat'l Management Co., 63 Fair Empl. Prac. Cas. (BNA) 609, 1993 LEXIS 31324 (6th Cir. 1993) upheld a jury verdict in favor of the plaintiff, analyzing the shifting burden of proof concept as follows:

> Once the plaintiff establishes a prima facie case, the defendant must then come forward with evidence of a legitimate, non-discriminatory reason for the discharge. The plaintiff must then carry the ultimate burden of proving by a preponderance of the evidence that the reasons offered by the defendant were apretext for discrimination... The plaintiff may carry this burden either directly by persuading the jury that a discriminatory motive more likely motivated the employer, or indirectly by showing that the proffered reason is unworthy of belief.

Id. at *6 (citing Moody v. Pepsi-Cola Metro. Bottling Co., 915 F.2d 201, 208 (6th Cir. 1990)) (emphasis added)(citation omitted). In accord seems to be Kline v. Tennessee Valley Auth., 1993 U.S. App. LEXIS 20286 (6th Cir. July 29,

1993)[16] (disbelief of the employer's proffered reason may give rise to an inference of discrimination), but on the other side of the issue appears to be Gibb v. Kemp, 1993 U.S. App. LEXIS 19025 (6th Cir. July 15, 1993)[17] (rejecting plaintiff's contention that "pretext plus" not required).

The First Circuit, long a strong proponent of the "pretext-plus" rule, remained so in this case, even after analyzing Hicks, when it stated, "In the context of a summary judgment proceeding, Hicks requires that, once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age." (citing previous First Circuit cases) (App. 15a). As a result of viewing this case under this higher standard of proof, the Court of Appeals agreed with each and every inference offered by Respondent

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[16] Not recommended for full-text publication. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties in the court. 6th Cir. R.24. For purposes of this Petition, this citation is offered not to show established precedent in the circuit, but merely to demonstrate the most current interpretation of law by the court of appeals.

[17] Refer to Footnote 16.

with respect to the record below, but its rationale was strained and often at odds with common sense.

Thus, in response to Petitioner's contention that the three-person October 1990 reduction in force was anything but a bona fide or good-faith staff reduction, the court relied on dicta from the Sixth Circuit's opinion in Barnes v. GenCorp, Inc., 896 F.2d 1457, 1465 (6th Cir. 1990), cert. denied, 498 U.S. 878 (1990) that a valid reduction in force can occur even when only one position is eliminated. In doing so, the court ignored the fact that there was really no reduction at all, since there were just as many salaried exempt employees in the Northeast Zone in 1991 as in 1990. Moreover, the court also chose to ignore evidence showing that between the middle of October 1990 and the end of the year, Great American, instead of eliminating vacant salaried exempt positions, sought through advertising within the company to fill a total of fourteen such positions (A148-149), hardly consistent with a bona fide desire to trim costs.

With respect to the creation and filling of new AOR positions shortly before LeBlanc's termination, the lower court's finding that there could be "perfectly legitimate considerations for increasing the number of AORs elsewhere in the region while cutting back in Eastern Massachusetts" (App. 21a) missed the point entirely. As the court itself pointed out (App. 24a), losses in other parts of the region were even greater than in Eastern Massachusetts -- $3.8 million in New England and $4.5 million in New Jersey -- yet instead of losing AORs, these areas added new AOR positions and filled them, with no subsequent cutback. With the Northeast Zone incurring a loss of $11.8 million in 1990 compared to a profit of $111,000 the previous year (App. 24a), the layoff of three from over 200 salaried exempt employees, while creating new positions similar to

one of those being eliminated and seeking to fill others that are vacant, simply belies common sense and severely undermines Great American's articulated reason for terminating LeBlanc.

It was clearly the court's application of its "pretext-plus" rule which led it to conclude that Petitioner's "arguments (about the inferences to be drawn from the evidence in the record) are based largely upon conclusory allegations, improbable inferences, and unsupported speculation." (App. 30a). LeBlanc's proof was anything but.

The circuit which seems to be the most consistent with Hicks and its rationale is the Second Circuit, as reflected in its decision in DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993), where the court held, "[p]roof that the employer has provided a false reason for its action permits the finder of fact to determine that the defendant's actions were motivated by improper discriminatory intent, but does not compel such a finding." Id. at 170 (citation omitted). The court in DeMarco, citing Hicks, held that the jury, upon finding that a prima facie case has been made out, and after receiving the employer's proffered reason, should consider whether that reason is pretextual, focusing its inquiry not on whether the reason is "unwise or unreasonable", but whether it is the real reason, i.e. "the actual purpose for the challenged employment-related action." Id. at 171.

This approach allows a jury to find intentional discrimination if it is satisfied with the evidence of pretext, but at the same time allows it to find for the employer if it is not so satisfied, which is exactly what this Court intended in Hicks. It also recognizes the increasingly difficult task facing plaintiffs in uncovering and presenting direct evidence

of discriminatory animus while putting a premium on the employer, who has the factual proof more readily at his disposal than the employee, to tell the truth. The First Circuit's "pretext-plus" rule, as reflected in its comment in this case that a plaintiff cannot avoid summary judgment without presenting "adequate, direct or circumstantial evidence of discriminatory animus on the part of the employer" (App. 15a), is at odds with the rationale of both Hicks and DeMarco. Accordingly, this Court should review this case to clear up the confusion which persists after Hicks and send a clear message that a plaintiff in an employment discrimination case is not required to offer direct or circumstantial evidence of discriminatory animus when there is proof of a prima facie case of discrimination and enough evidence of pretext to discredit the employer's proffered reason.

III. THE COURT OF APPEALS ERRED IN NOT CONSIDERING PETITIONER'S STATISTICAL EVIDENCE UNDER A DISPARATE IMPACT THEORY IN LIGHT OF RESPONDENT'S FACIALLY NEUTRAL REASON FOR TERMINATING LEBLANC.

The Court of Appeals characterized Petitioner's case as a disparate treatment case (App. 26a) and analyzed Petitioner's statistical evidence solely from the standpoint of whether that evidence rebutted the specific reason offered by Great American for its treatment of LeBlanc. This was error because the court also should have considered this case under a theory of disparate impact. Although this Court has never addressed the issue of whether a disparate impact theory of

liability is available to a plaintiff in an age discrimination case -- Hazen Paper Co. v. Biggins, __ U.S. __,-__, 113 S. Ct. 1701, 1706 (1993)[18] -- such a theory should be available to a plaintiff where the reason proffered by the employer for its actions is, as it was here, facially neutral.

Unlike a disparate treatment case where the credibility of the reason advanced by the employer for its actions is the critical issue, the issue in a disparate impact case is whether, by virtue of an employer's facially nondiscriminatory practice, a protected employee or group of employees is adversely affected. Watson v. Ft. Worth Bank and Trust, 487 U.S. 988, 986-87 (1988). Thus, while the employer's intent and motive, and the issue of pretext, are paramount in a disparate treatment case, those factors become less important in a disparate impact case where the focus is on the effect of an employment practice that is neutral on its face. Consequently, the element of intent has been removed as an essential element of proving discrimination in a disparate impact case. Id., supra, at 987; Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

In addition, disparate impact and disparate treatment are alternative theories that, where the evidence warrants, can and should be considered simultaneously by the court. MacPherson, supra note 18; Sobel v. Yeshiva Univ., 839 F.2d 18 (2d Cir. 1988) (plaintiff held not to have waived

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[18] However, see MacPherson v. Univ. of Montevallo, 922 F.2d 766 (11th Cir. 1991), where the Eleventh Circuit did consider disparate impact theory in an ADEA case.

disparate impact argument even where not specifically mentioned as such until after seven years of discovery and in the middle of trial). The fact that Petitioner did not specifically choose to have his case considered by the District Court or the Court of Appeals under a disparate impact theory did not preclude either court from considering the case in that light. MacPherson, supra; Sobel, 839 F.2d at 24-25. While a plaintiff may not suddenly resort to a disparate impact theory where it would prejudice or unfairly surprise his or her adversary, such prejudice or surprise would only arise if the plaintiff changes or adds theories in the aftermath of a trial -- see Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 604-05 (2d Cir. 1986) (disparate impact claim barred where raised after trial completed); Ste. Marie v. Eastern R.R. Ass'n, 650 F.2d 395, 399 n.2 (2d Cir. 1981) (disparate impact claim barred where raised after trial, on appeal, and after parties consented to disparate treatment theory only). Here, there was no trial. Moreover, Petitioner alleged in his complaint a pattern and practice of discrimination, and neither Respondent nor the District Court called upon Petitioner to specify the theory of liability under which he was proceeding. Furthermore, Cobb's report should have put Respondent on notice that Petitioner sought to have his claim considered under a disparate impact theory, because Cobb, instead of just focusing on LeBlanc's termination and the reasons offered by Great American for it, analyzed the company's practices over a three-year period, finding that they had a disparate impact on a protected group, i.e., those over forty.

In a disparate impact case, as the Court of Appeals in this case acknowledged, statistical evidence carries more probative weight than it does in a disparate treatment case. (App. 26a). This is because, as the court below noted,

statistical evidence tends to address a pattern and practice and not the specific reason offered by the employer for its actions with respect to one employee. (App. 26a-27a). It is circumstantial evidence showing a pattern of discrimination resulting from an employer's actions over a period of time having an adverse impact on a protected group. Thus, while statistical evidence alone is sufficient in a disparate impact case to support a finding of discrimination -- see Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1989); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977); Teamsters v. United States, 431 U.S. 324, 339 (1977) -- it comes under far harsher scrutiny in a disparate treatment case and is given less probative weight. Bazemore v. Friday, 478 U.S. 385, 400 (1986). See also Barnes v. GenCorp, Inc., 896 F.2d 1457 (6th Cir. 1990), cert. denied, 498 U.S. 878 (1990) (in a disparate treatment case, for statistical evidence to create inference of discrimination, it must show not only significant disparity but also eliminate nondiscriminatory explanations for the disparity).

As a result, the court below criticized Cobb for not considering in his analysis the available applicant pool for AORs in the Northeast Zone, for not distinguishing between voluntary and involuntary terminations in his study of the three-year data[19], and for including in his analysis job

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[19] Ironically, this same criticism was levelled at Cobb in another age discrimination case, a disparate treatment case, decided by the First Circuit several years before this case, but the panel in that case dismissed it. Freeman v. Package Mach. Co., 865 F.2d 1331, 1338-39 (1st Cir. 1988). Reconciling the result in this case with

eliminations for 1991 which, taken alone, did not reflect age disparity. (App. 28a). None of these criticisms are substantial, and, as the First Circuit itself once said, they are "best categorized as fodder for cross-examination or rebuttal at trial, rather than for appellate review." Freeman, supra note 19. With respect to the nature of the terminations, just as in Freeman, the data provided by Great American and given to Cobb listed Petitioner as having retired (App. 43a), hardly an indication to Cobb that he could rely on the company's records to accurately portray the circumstances of each termination. Freeman at 1338-39. As to not considering the applicant pool, Cobb would undoubtedly testify that this was a termination case, not a refusal to hire case, thereby making less relevant the pool of applicants for AOR positions. Moreover, the hiring date for each AOR did not always correspond to the date of assignment to a new AOR position, making it difficult, if not impossible, to

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that reached by the same court in Freeman is difficult at best, given that the court in Freeman found "scant" direct evidence of discrimination and Cobb followed the same methodology that he did in this case. Other irreconcilable inconsistencies also exist between this case and Freeman. Thus, whereas in this case, the court pointed to cases from other circuits, five in all, in support of its conclusion that the sample used by Cobb was too small (App. 28a-29a), the panel in Freeman, addressing the same issue, said, "[w]here the probative weight of a particular expert's testimony is at issue...other reported cases have limited applicability." Id. at 1342, n.5. In the same footnote, the court went on to say, "[e]ven small samples are not per se unacceptable." Id.

identify a specific applicant pool for comparison purposes. Thus, for example, Jill Jacobson, who at the age of twenty-three was assigned as an AOR to the New England office in June 1990, had been hired a year earlier (June 1989). (A130, 135).

With respect to the court's criticism of Cobb for including seventeen job eliminations in 1991 where there was no overall age disparity[20], had Cobb not included it in his analysis, he could have been faulted for presenting an incomplete analysis. What is notable is that even when he included the 1991 job elimination data, Cobb still found for the three-year period statistical significance in the age differences between those salaried exempt employees whose jobs were eliminated and those whose jobs were not eliminated.[21] (A217, 218). Finally, Cobb analyzed not just terminations and job eliminations of all salaried exempt employees over a three-year period, but he also focused his analysis on the AORs for that period, making six separate comparisons of the AOR work force. (A214-217).

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[20] Some of these job eliminations undoubtedly occurred after April of that year when Petitioner filed his age claim with the MCAD, and this might well have been viewed by a jury as an effort by Great American to balance the data that would later come under scrutiny by Petitioner's statistician.

[21] Cobb applied the Fisher method, an accepted statistical test with which the lower court apparently did not find fault.

Where, as here, the employer has offered a reason for its termination decision that is neutral on its face because it should affect all employees equally, a disparate impact theory of liability should be available to the employee, regardless of the type of discrimination involved. In virtually all respects, age discrimination cases are treated no differently by the courts than Title VII employment discrimination cases, e.g. the McDonnell Douglas shifting burden of proof framework is applicable to both, yet only Title VII plaintiffs may advance disparate impact as a theory of liability. LeBlanc's termination, according to Respondent, was the result of a reduction in force, a reason that is completely neutral on its face. It is also a reason that has been offered for years in termination cases under Title VII and addressed by plaintiffs under a disparate impact theory. There is no logical rationale why a plaintiff in an age discrimination case should not be allowed to argue disparate impact theory where the reason proffered for his or her termination is reduction in force.

CONCLUSION

Consideration of this case by this Court is warranted in order to resolve the important issue of whether a plaintiff in an employment discrimination case must present specific evidence of discriminatory animus in addition to proving a prima facie case and pretext; and, in addition or alternatively, whether disparate impact is a theory of liability available to a plaintiff in an age discrimination case. For the foregoing reasons, this Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

Attorneys for
Petitioner
Theodore L. LeBlanc

Dated: January 24, 1994

Walter M. Phillips, Jr.
Counsel of Record
Leland I. Kellner
Phillips & Phelan
Suite 1600
121 S. Broad Street
The North American Bldg.
Philadelphia, PA 19107

No.___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THEODORE L. LEBLANC,
Petitioner,

v.

GREAT AMERICAN INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPENDIX

WALTER M. PHILLIPS, JR.
Counsel of Record
LELAND I. KELLNER
PHILLIPS AND PHELAN
SUITE 1600
THE NORTH AMERICAN
BUILDING
121 SOUTH BROAD STREET
PHILADELPHIA, PA 19107
(215) 546-0500

Attorneys for Petitioner
Theodore L. LeBlanc

United States Court of Appeals
For the First Circuit

No. 93-1050

THEODORE L. LEBLANC,

Plaintiff, Appellant,

v.

GREAT AMERICAN INSURANCE COMPANY,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Selya, Circuit Judge,

Campbell, Senior Circuit Judge,

and Cyr, Circuit Judge.

Walter M. Phillips, Jr., with whom Phillips and Phelan, Sigmund J. Roos and Peabody & Brown were on brief for appellant.

Kalvin M. Grove with whom Joel W. Rice and Fox and Grove, Chartered were on brief for appellee.

September 29, 1993

CAMPBELL, Senior Circuit Judge. On October 19, 1990, the defendant-appellee, Great American Insurance Company ("Great American"), terminated its employment of the plaintiff-appellant, Theodore L. LeBlanc, who was then fifty-nine years old. LeBlanc brought this action in the district court against his former employer pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1985 & Supp. 1993) and Mass. Gen. L. ch. 151B, § 4. The district court entered summary judgment in Great American's favor, and this appeal followed. We affirm.

I.
JURISDICTION

Great American contends that this court is without jurisdiction over LeBlanc's appeal from the district court's order granting summary judgment in its favor. To follow this argument, it is necessary to understand the procedural history.

The district court rendered its final judgment granting summary judgment to Great American on November 2, 1992. On November 10, LeBlanc moved for reconsideration under Fed. R. Civ. P. 59 (e). On December 2, 1992, while this motion for reconsideration was still pending, LeBlanc filed a notice of appeal from the November 2, 1992, grant of summary judgment. Because at the time LeBlanc filed his notice of appeal, the district court had not yet ruled on LeBlanc's motion for reconsideration, we determined that we were without jurisdiction to consider the appeal and accordingly dismissed it. On December 21, 1992, the district court denied LeBlanc's motion for reconsideration. LeBlanc filed a second notice of appeal on December 28. The second notice of appeal asked for relief "from the Order entered December 21, 1992, denying Plaintiff's Motion for Reconsideration of the court's previously entered order of

November 2, 1992, granting summary judgment in favor of defendant Great American Insurance Companies [sic]."

Great American argues that LeBlanc's second notice of appeal, because it only challenges the district court's denial on December 21 of LeBlanc's Rule 59(e) motion, does not confer jurisdiction upon this court to entertain an appeal from the district court's judgment of November 2, 1992, granting summary judgment. Appellee insists we possess jurisdiction only to consider the narrower factors relevant to the district court's denial of LeBlanc's motion for reconsideration. We disagree.

It is true that Fed. R. App. P. 3(c) states that "[t]he notice of appeal shall specify the . . . order or part thereof appealed from." Rule 3(c)'s "commands are jurisdictional and mandatory." Kotler v. American Tobacco Co., 981 F.2d 7, 10-11 (1st Cir. 1992) (citing Smith v. Barry, ____ U.S. ___, 112 S. Ct. 678, 682, 116 L. Ed. 2d 678 (1992); Torres v. Oakland Scavenger Co., 487 U.S. 312, 315-16, 108 S. Ct. 2405, 2407-08, 101 L. Ed. 2d 285 (1988)). Nevertheless, courts have been admonished to interpret Rule 3 (c) liberally. Id.; see Foman v. Davis, 371 U.S. 178, 181-82, 83 S. Ct. 227, 22830, 9 L. Ed. 2d 222 (1962).

In general, "an appeal from the denial of a Rule 59(e) motion is not an appeal from the underlying judgment." Mariani-Giron v. Acevedo-Ruiz, 945 F.2d 1, 3 (1st Cir. 1991) (citing Rodriguez-Antuna v. Chase Manhattan Bank Corp., 871 F. 2d 1, 2-3 (1st Cir. 1989); Pagan v. American Airlines, Inc., 534 F.2d 990, 992-93 (1st Cir. 1976)). Yet this rule is not inflexible. This circuit has allowed a timely appeal from the denial of a timely Rule 59(e) motion to serve as notice of an appeal from the underlying judgment in cases where the appellant's intent to appeal from the judgment is clear. Id; Foman, 371 U.S. at 181-82. In making this assessment, we consider the notice of appeal "in

the context of the record as a whole." Kotler, 981 F.2d at 11.

Foman v. Davis involved facts very similar to those in this case. The district court had dismissed the complaint for failure to state a claim upon which relief could be granted. The next day, plaintiff moved to vacate the judgment, pursuant to Fed. R. Civ. P. 59 (e), and also moved to amend the complaint. While the motions were still pending, plaintiff filed a notice of appeal from the district court's dismissal of the complaint. Shortly thereafter, the district court denied the plaintiff's motions. The plaintiff then filed a second notice of appeal from the denial of the motions.

Although the parties in Foman briefed and argued the merits of the district court's dismissal of the complaint as well as the district court's denial of the plaintiff's motions, the court of appeals, of its own accord, dismissed the appeal insofar as it was taken from the district court's dismissal of the complaint. The court of appeals held that the second notice of appeal was "ineffective to review the . . . judgment dismissing the complaint because the notice failed to specify that the appeal was being taken from that judgment as well as from the orders denying the motions." Foman, 371 U.S. at 180-81.

In reversing the court of appeals, the Supreme Court held that "[t]he defect in the second notice of appeal did not mislead or prejudice the respondent." Id. at 181. Although the Court agreed that the first premature notice of appeal had had no effect,[1] it ruled that, "[t]aking the two notices and the

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[1] Similarly, the first notice of appeal in this case was without effect. See Fed. R. App. P. 4(a)(4)(iii) (stating that a notice of appeal filed before the disposition of a

appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest." Id. The Court found support for this conclusion from the fact that both parties had briefed and argued the merits of the dismissal on appeal.

The Court's decision in Foman seems to us to be dispositive here. LeBlanc's intent to appeal from the district court's November 2, 1992, grant of summary judgment was plain. The two notices taken together revealed LeBlanc's desire to appeal not just from the motion for reconsideration but also from the underlying judgment. This conclusion finds further support in the fact that the two parties briefed and argued the merits of the district court's grant of summary judgment.

II.
BACKGROUND

Great American is an all lines insurance company with its headquarters in Cincinnati, Ohio. As of October 1990, when Great American dismissed LeBlanc, Great American was divided into four geographical regions: Northeast, South, Midwest, and West. In addition to these geographical divisions, Great American was organized according to the lines of business, distinguishing between personal and commercial lines of insurance. At the time of his discharge, LeBlanc was employed by Great American Northeast, Inc. (the "Northeast Zone) in its commercial lines division.

Great American hired LeBlanc in October 1980 as a branch manager in its Wheaton, Maryland, office. At that time, LeBlanc was forty-nine years old. From 1980 through

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motion under Rule 59 to alter or amend the judgment shall have no effect).

1988, LeBlanc worked for Great American in Maryland. In January 1989, Great American transferred the fifty-seven-year-old LeBlanc, with his consent, to eastern Massachusetts to serve as a commercial lines Agency Operations Representative ("AOR"). The transfer was approved by Al Conte, then-acting president of the Northeast Zone, who also agreed to pay for LeBlanc's moving expenses and to give him a sixteen percent pay raise.

In his capacity as an AOR, LeBlanc was expected to market Great American commercial insurance to independent agents or brokers in eastern Massachusetts and assist those agents and brokers who were already selling Great American's insurance products. When LeBlanc started in eastern Massachusetts, he joined Charles DeMartino, then fifty-six years old, as one of two AORs marketing Great American commercial lines insurance in eastern Massachusetts. LeBlanc and DeMartino worked together in eastern Massachusetts until LeBlanc's discharge.

According to Great American's evidence, which is not contradicted, the decision to dismiss LeBlanc had its genesis in August 1990, when Conte began to prepare a budget for the upcoming year for the Northeast Zone. Because the Northeast Zone was experiencing financial problems at the time, Thomas Hayes, Executive Vice-President of Great American, instructed Conte to submit a leaner budget to corporate headquarters. Although Conte sought ways to reduce expenses without dismissing personnel, he concluded, in September and early October 1990, that personnel cuts would have to be made.

Conte decided, with the approval of Hayes and Human Resources personnel in Cincinnati, to eliminate or leave vacant five positions in the Northeast Zone. Those people directly affected by Conte's decision included LeBlanc, William St. George, a forty-seven-year-old

underwriter working in the Windsor, Connecticut, headquarters of the Northeast Zone, and Dwight Bowie, the thirty-eight-year-old Profit Center Manager in Hartford, Connecticut. In addition, two other vacant positions in the Northeast Zone were eliminated. They included the AOR Manager in the Syracuse, New York, office, a position that had already been vacated by the resignation of Tim Johnson, age twenty-six, and an underwriting position in Hartford, Connecticut, that had been vacant for some time.

On October 19, 1990, Great American informed LeBlanc that he was being dismissed. LeBlanc was told that the decision to eliminate his position was based on budget constraints, and not because of his age or his individual performance. Immediately after LeBlanc's discharge, DeMartino, the remaining AOR in eastern Massachusetts, who was then fifty-seven, assumed responsibility for four or five of the approximately fifteen insurance agents whom LeBlanc had serviced. The remaining agents were assigned to underwriters in Great American's Lancaster, Pennsylvania, office, which was responsible for underwriting insurance in eastern Massachusetts.

Approximately nine months later, in July of 1991, Great American decided to transfer underwriting responsibility for eastern Massachusetts from the Lancaster office to the Windsor, Connecticut, office. At that time, Anne Daley, a thirty-year-old AOR from the Windsor, Connecticut, office, began to service agents in eastern Massachusetts. Daley, who had been hired by Great American prior to LeBlanc's discharge, and who had previously serviced agents in Connecticut and western Massachusetts, dropped her Connecticut agents to service the eastern Massachusetts agents, but continued to service agents in western Massachusetts. From July through September 1991, Daley serviced some of LeBlanc's former eastern

Massachusetts agents. Daley left Great American in September 1991. Since that time, DeMartino has been the only Great American AOR servicing agents in eastern Massachusetts.

III.
DISCUSSION

A. Summary Judgment

Because our review of a grant of summary judgment is de novo, we, like the district court are obliged to review the record in the light most favorable to the nonmoving party, and to draw all reasonable inferences in the nonmoving party's favor. Mesnick v. General Elec. Co., 950 F.2d 816, 820 (1st Cir. 1991), cert. denied, ____ U.S. ____, 112 S. Ct. 2965, 119 L. Ed. 2d 586 (1992); Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). Summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993); Lawrence v. Northrop Corp., 980 F.2d 66, 68 (1st Cir. 1992).

Summary judgment is a procedure that involves shifting burdens between the moving and the nonmoving parties. Initially, the onus falls upon the moving party to aver "'an absence of evidence to support the nonmoving party's case." Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986)). Once the moving party satisfies this requirement, the pendulum swings back to the nonmoving party, who must oppose the motion by presenting facts that show that there is a "genuine issue for trial." Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986) (citing Fed. R. Civ. P. 56(e)); see Goldman, 985 F.2d at 1116; Lawrence, 980 F.2d at 68; Garside, 895 F.2d at 48 ("[A] 'genuine issue' exists if there is 'sufficient evidence supporting the claimed factual dispute' to require a choice between 'the parties' differing versions of the truth at trial.'" (quoting Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904, 96 S. Ct. 1495, 47 L. Ed. 2d 754 (1976)). To oppose the motion successfully, the nonmoving party "may not rest upon mere allegation or denials of his pleading." Anderson, 477 U.S. at 256. Moreover, the evidence presented by the nonmoving party "'cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial.'" Mesnick, 950 F-2d at 822 (quoting Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)). Indeed, "[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R. J. Reynolds Tobacco Co., 896 F.2d 5, 6 (1st Cir. 1990). Thus, to defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial-worthy issue by presenting "enough competent evidence to enable a finding favorable to the nonmoving party." Goldman, 985 F.2d at 1116 (citing Anderson, 477 U.S. at 249).

B. The Age Discrimination Claims[2]

1. The Legal Framework

In an ADEA discrimination lawsuit, the plaintiff bears the ultimate "'burden of proving that his years were the determinative factor in his discharge, that is, that he would not have been fired but for his age.'" Mesnick, 950 F.2d at 823 (quoting Freeman v. Package Mach. Co., 865 F.2d 1331, 1335 (1st Cir. 1988)). At least when there is little overt evidence of age discrimination, the case usually follows the ritualized burden-shifting paradigm in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-26, 36 L. Ed. 2d 668 (1973); see, e.g., Goldman v. First Nat'l Bank of Boston, 985 F. 2d 1113 (1st Cir. 1993); Lawrence v. Northrop Corp., 980 F. 2d 66 (1st Cir. 1992); Mesnick v. General Elec. Co., 950 F.2d 816 (1st Cir. 1991), cert. denied, ____ U.S. ____, 112 S. Ct. 2965, 119 L. Ed. 2d 586 (1992). Under this formulation, a plaintiff opens with a prima facie showing of certain standardized elements suggestive of possible discrimination. McDonnell Douglas, 411 U.S. at 802; Goldman, 985 F.2d

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[2] LeBlanc does not specifically argue that the district court erred in granting summary judgment for Great American under the Massachusetts Anti-Discrimination Act, Mass. Gen. L. ch. 151B, § 4 (1982 & Supp. 1988). Lack of reference to the state act makes little difference, however, because the burden of proof under the Massachusetts Act is similar to the one under the ADEA. Menard v. First Sec. Servs. Corp., 848 F.2d 281, 289 n.5 (1st Cir. 1988) (citing Lewis v. Area II Homecare for Senior Citizens, 397 Mass. 761, 493 N.E.2d 867, 870-71 (1986)).

at 1117; Lawrence, 980 F.2d at 69; Mesnick, 950 F.2d at 823.

The elements of the prescribed prima facie case vary, within the age discrimination context, depending upon whether or not plaintiff was dismissed as part of a reduction in force. If there was no reduction in force, plaintiff establishes the prima facie case by demonstrating that he "(1) was at least forty years of age, (2) met the employer's legitimate job performance expectations, (3) experienced adverse employment action, and (4) was replaced by a person with roughly equivalent job qualifications." Goldman, 985 F.2d at 1117; see Mesnick, 950 F.2d at 823. But if the job loss was part of a reduction in force, plaintiff need not show replacement by someone with equivalent job qualifications. Instead, to satisfy element (4), plaintiff may demonstrate either that "the employer did not treat age neutrally or that younger persons were retained in the same position." Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1111 (1st Cir. 1989), quoted in Goldman, 985 F.2d at 1117; Lawrence, 980 F.2d at 69; Connell v. Bank of Boston, 924 F.2d 1169, 1173 n.5 (1st Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 2828, 115 L. Ed. 2d 997 (1991).

Establishment of the prescribed prima facie case creates a presumption that the employer engaged in impermissible age discrimination. See, e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981); Goldman, 985 F.2d at 1117. However, to rebut this presumption, the employer need only "articulate a legitimate nondiscriminatory reason for the employee's termination." [Emphasis supplied.] Lawrence, 980 F.2d at 69 (citations omitted). The employer's obligation is simply one of production. "[T]he burden of persuasion remains [the

employee's] at all times." Id. (citing Mesnick, 950 F.2d at 823).

Courts have commonly said that once the employer has proffered a legitimate, nondiscriminatory reason for its adverse employment decision, the presumption generated by the employee's prima facie case disappears, and the burden falls back upon the employee to prove that the reason advanced by the employer for the adverse employment action constituted a mere pretext for unlawful age discrimination. See, e.g., Goldman, 985 F.2d at 1117; Lawrence, 980 F.2d at 69; Mesnick, 950 F.2d at 823-24. In this circuit, we have always required not only "minimally sufficient evidence of pretext," but evidence that overall reasonably supports a finding of discriminatory animus. Goldman, 985 F.2d at 1117; Lawrence, 980 F.2d at 69-70 (citing Mesnick, 950 F.2d at 825; Villanueva v. Wellesley College, 930 F. 2d 124, 127 (1st Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 181, 116 L. Ed. 2d 143 (1991); Connell, 924 F.2d at 1172; Medina-Munoz, 896 F.2d at 9; Olivers v. Nestle P.R., Inc., 922 F.2d 43, 48 (1st Cir. 1990)).

This approach - and particularly the latter aspect, adopted in some but not all circuits - was clarified by the Supreme Court last term. The Court held that, once the employer succeeds "in carrying its burden of production, the McDonnell Douglas framework--with its presumptions and burdens--is no longer relevant." St. Mary' s Honor Ct. v. Hicks, ___ U.S. ___, 113 S. Ct. 2742, 2749, ___ L. Ed.2d ___ (1993). According to the Court:

> The presumption [raised by the plaintiff's prima facie case], having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture

> . . . . The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether [the] plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race . . . . The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination . . .

___ U.S. _____, 113 S. Ct. at 2749 (citations omitted). Although the Hicks case arose in the context of a race discrimination claim brought pursuant to Title VII of the Civil Rights Act of 1964, the Court's decision seems equally applicable to age discrimination lawsuits brought under the ADEA.

Thus, in an age discrimination case, once the employer articulates a legitimate, nondiscriminatory reason for its decision to discharge the employee, the McDonnell Douglas presumption "drops out of the picture." Hicks,

___ U.S. ___, 113 S. Ct. at 2749. The trier of fact must then simply determine, based on all the evidence, whether the employer's decision to terminate the plaintiff was motivated by intentional age discrimination. Id. In reaching this decision, the trier of fact may consider, along with other evidence, the evidence put forward to show that the employer's justification for its adverse employment action was a pretext. Id. Such evidence, coupled with the elements of the employee's prima facie case (and, of course, any other evidence), may (or may not) lead the factfinder to infer that the employer has engaged in intentional discrimination. Id.

The Hicks decision emanated from an appeal from a full bench trial. In the context of a summary judgment proceeding, Hicks requires that, once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age. Goldman, 985 F.2d at 1117; Lawrence, 980 F.2d at 69-70; Villanueva, 930 F.2d at 127-28; Connell, 924 F.2d at 1172. "Direct or indirect evidence of discriminatory motive may do, but 'the evidence as a whole . . . must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by age animus.' " Goldman, 985 F.2d at 1117 (quoting Connell, 924 F.2d at 1172 n.3). Thus, the plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer. See Id. at 1118 (citations and footnote omitted).

2. The Prima Facie Case

The district court granted summary judgment in Great American's favor on the initial ground that LeBlanc had failed to make out a prima facie case of age discrimination. While it is not clear to us that the court erred in this regard, we prefer - because the question is so close - to assume for present purposes that LeBlanc did establish a prima facie case within the McDonnell Douglas formulation. This leads us, infra, to examine the adequacy of the evidence of discriminatory animus, concluding, as we do, that it is insufficient to create a triable issue.

There is no direct evidence that Great American discharged LeBlanc because of his age, and the parties agree that LeBlanc satisfies the first three of the four elements of his prima facie case under the McDonnell Douglas paradigm.[3] What is disputed is whether LeBlanc has established the fourth element of his prima facie case. Great American argues that, because this is a reduction in force case, LeBlanc must demonstrate - and has failed to do so - that Great American either failed to treat age neutrally in making its decision to terminate him or retained younger persons in the same position that he held.[4]

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[3] At the time of his discharge, LeBlanc was fifty-nine years of age. This satisfies the first element of the McDonnell Douglas standard, which, in age cases, requires the plaintiff to be over the age of forty. In addition, LeBlanc was meeting Great American's job performance expectations. Finally, LeBlanc experienced adverse employment action, having been discharged.

[4] LeBlanc does not agree that this is a reduction in force case. He claims that Great American's characterization of this case as such is merely a pretext for

LeBlanc maintains that Great American did not treat age neutrally and that it retained younger employees in the same position that he held because, when Great American discharged him in October 1990, it continued to employ thirty other younger AORs in the Northeast Zone. Moreover, LeBlanc intimates that Great American failed to treat age neutrally because two of the three people whom Great American actually discharged as part of its reduction in force, including LeBlanc, were members of the protected class, i.e., were forty or older. We are not convinced that the AOR positions held by the thirty other AORs elsewhere in the region may properly be considered the "same" position LeBlanc held. While we agree that the other AOR position in eastern Massachusetts, which continued to be held by DeMartino (a man almost identical in age to LeBlanc), was the "same" position, we are less clear that other AOR positions scattered around the region - say, in Syracuse, New York - were the same. Cf. Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir.) (retention of younger people in other jobs which plaintiff was qualified to perform not sufficient to establish a prima facie case), cert. denied, 498 U.S. 878, 111 S. Ct. 211, 112 L. Ed 2d 171 (1990). We also question whether a company can be said not to treat age neutrally as a matter of law merely because two of the three people it discharges pursuant to a reduction in force belong to the protected class. A sample of three is a small number from which to draw deductions of this sort. Still, we shall assume, without deciding, that these two facts taken together would satisfy the fourth element of the McDonnell Douglas

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Great American's discriminatory conduct. Nevertheless, even assuming a reduction in force occurred, LeBlanc contends that he has made out a prima facie case.

test, bearing in mind the Court's admonition that "[t]he burden of making out a prima facie case is 'not onerous.'" Mesnick, 950 F.2d at 823 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 253).

3. Great American's Justification

Assuming, without necessarily finding, that LeBlanc has established a prima facie case of age discrimination, we turn next to the second prong of the McDonnell Douglas test. This calls for determining whether Great American has articulated a legitimate, nondiscriminatory reason for LeBlanc's dismissal. We hold that it plainly has.

Great American maintains that it reduced its force in the Northeast Zone in October 1990 because the region was experiencing financial difficulties. Al Conte, acting President of the Northeast Zone, stated in an affidavit that the financial difficulties in the Northeast Zone were attributable to a downturn in the region's economy, high fixed expenses, and state-mandated residual assessments, or government pooling requirements, levied against commercial lines of insurances.[5]

Great American asserts that it discharged LeBlanc as part of this economically-driven reduction in force for a number of interrelated business reasons. Conte, who actually made the decision to eliminate LeBlanc's position, stated that he looked to eliminate this Massachusetts position

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[5] These pooling requirements were charges assessed by state governments against insurance companies in certain lines of insurance intended to fund otherwise uninsurable business. These charges were based upon each insurer's pro rata percentage of total premiums written in that state for a given line of insurance.

because Massachusetts was the least profitable state in the Northeast Zone. In addition, eastern Massachusetts, an extremely small geographic area, was being serviced by two experienced AORS, LeBlanc and DeMartino. Conte believed that eastern Massachusetts would be the least harmed of the Northeast Zone regions by the elimination of a full-time AOR position. Finally, Conte chose to retain DeMartino, then fifty-eight years old (a year younger than LeBlanc), because DeMartino had a longer tenure in Massachusetts and had a claims adjusting background, not possessed by LeBlanc, that provided Great American with greater versatility in the event of hurricanes, storms, or floods.

The explanations for LeBlanc's discharge offered by Conte fully satisfy Great American's burden of production under the second prong of the McDonnell Douglas test. It has presented, '"through the introduction of admissible evidence,' reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Ctr. v. Hicks, ___ U.S. ___, 113 S. Ct. at 2747 (quoting Burdine, 450 U.S. at 254-55) (emphasis in original). Accordingly, the presumption of age discrimination raised by LeBlanc's prima facie case has vanished. Left to be decided is whether the evidence, in its entirety, would permit a reasonable factfinder to infer that Great American's decision to terminate LeBlanc was inspired by age animus.

4. LeBlanc's Evidence of Age Animus

LeBlanc points to two types of circumstantial evidence as supporting an inference that Great American's decision to terminate him was motivated by intentional age discrimination. First, LeBlanc contends that the reasons articulated by Great American for his dismissal

could be found to be mere pretexts offered to disguise the defendant's age animus. Second, LeBlanc argues that certain statistical evidence he presented suffices to show that Great American was engaging in a pattern of discriminatory conduct towards older employees.

a. Evidence of Pretext

LeBlanc submits that a layoff of only three employees out of 212 salaried, exempt employees in the Northeast Zone cannot be characterized as a bona fide reduction in force.[6] Moreover, he claims that Great American did not engage in a reduction in force because it hired ten new AORs in 1990 prior to his dismissal. We conclude, however, that a reasonable factfinder could not infer pretext or age discrimination from these circumstances.

An employer need not dismiss any particular number of employees, or terminate a set percentage of the work force, to institute a reduction in force. Rather, "[a] work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the Company." Barnes v. GenCorp Inc., 896 F.2d at 1465 (emphasis added). According to Al Conte, Great American's corporate headquarters ordered him to submit a leaner budget for the Northeast Zone for the upcoming year because it was concerned about the region's financial difficulties. To comply, Conte decided that it would be necessary to eliminate five positions, two of which were unfilled at the

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[6] Although LeBlanc fails to spell out the specific characteristics of a reduction in force as he understands the term, he insists that a true reduction in force occurs, for instance, when 1,000 employees out of an employee population of 5,500 are dismissed.

time. Under these circumstances, the fact that Conte laid off only three employees, including LeBlanc, as part of his claimed initiative to trim expenses does not by itself suggest that the dismissals were mere pretexts rather than bona fide reductions in force. Other evidence would be needed from which to conclude that Great American's stated reasons were mendacious.

Nor could a rational factfinder conclude that Great American's purported reduction in force was a pretext for age discrimination simply because it hired ten younger AORs elsewhere in the Northeast Zone in the period before discharging LeBlanc in October 1990. LeBlanc provides no evidence that the hiring of younger AORs outside of eastern Massachusetts was tied in any way to Great American's decision to eliminate the older LeBlanc's position in eastern Massachusetts; nothing suggests they were hired to assume LeBlanc's responsibilities. LeBlanc submits that a reasonable juror might conclude that a company as sophisticated as Great American would not legitimately decide to engage in a reduction in force shortly after adding ten new positions. But to reach any such conclusion on this record, a juror would have to indulge impermissibly in unsupported speculation. See Medina-Munoz, 896 F.2d at 8. One can imagine perfectly legitimate considerations for increasing the number of AORs elsewhere in the region while cutting back in eastern Massachusetts. It is not a court's role "to second-guess the business decisions of an employer." Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990).

LeBlanc also claims that he was not dismissed pursuant to a reduction in force because he was replaced by Anne Daley. It is true that "[a]n employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge." Barnes, 896

F.2d at 1457. Nonetheless, Daley did not, in fact, replace LeBlanc. A discharged employee "is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work." Id. Rather, "[a] person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties." Id.

Daley was not hired to perform LeBlanc's duties. She began working for Great American in its Windsor, Connecticut, office one month before LeBlanc was discharged, and did not begin to service agents and brokers in eastern Massachusetts until July 1991, approximately nine months after LeBlanc's departure. Prior to then, she serviced agents only in Connecticut and western Massachusetts. Even in July 1991, and thereafter, Daley did not perform anything like all of LeBlanc's former duties. Moreover, while assigned to some (though not all) of LeBlanc's former agents in eastern Massachusetts, she continued to service agents in western Massachusetts. Thus, at most, her temporary assignment included performing some of LeBlanc's prior responsibilities while carrying on duties of her own never performed by him. And even this partial performance of LeBlanc's duties lasted for only three months. This did not amount to replacing him.[7]

LeBlanc next disputes Great American's claim that it was experiencing financial difficulties in the Northeast Zone and in Massachusetts in 1990. LeBlanc opines that the primary method for

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[7] Since September 1991, when Daley resigned from Great American, Charles DeMartino has been the only AOR in eastern Massachusetts.

determining whether a particular state or a branch office is profitable is by comparing what is referred to as the total benchmark figure ("TBM") with the total loss ratio ("TOT") . According to LeBlanc, when the TBM figure exceeds the TOT figure, it reflects profitability. LeBlanc asserts that Great American's Gross Accident Year Analysis Report ("GAYAR") showed that, for the years 1987 through 1991, Massachusetts was the only state among the four largest producing states in the Northeast Zone[8] consistently to have a TBM figure that exceeded its TOT figure.

The GAYAR, however, was only one of many records kept by Great American that measured the company's profitability in the Northeast Zone and in Massachusetts. The Effective Accident Year Report for Massachusetts, for instance, revealed that, in 1990, the TOT figure exceeded the TBM figure fifty to forty-three.[9] This was a strong indication of unprofitability in Massachusetts. In addition, the profit and loss statements for the various offices in the Northeast Zone revealed that the region was experiencing financial difficulties in 1990. For instance, the Lancaster branch office, to which the eastern Massachusetts

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[8] The other three states include New York, New Jersey, and Connecticut.

[9] The difference between the GAYAR and the Effective Accident Year Report is that the former measured loss ratios on a policy year/accident year basis while the latter measured loss ratios on a calendar year basis. According to Robert McGuigan, who was a vice-president for Great American at the time of LeBlanc's discharge, executives would evaluate the calendar year loss ratios, not the policy year/accident year loss ratios, to assess profitability.

region reported, showed a calendar year underwriting loss in 1990 of approximately $3.7 million; the New Jersey profit center reported a calendar year underwriting loss in 1990 of roughly $4.5 million; and the New England profit center suffered a calendar year underwriting loss in 1990 of approximately $3.8 million. All told, the Northeast zone incurred a calendar year underwriting loss in 1990 of $11.8 million.[10]

Given this evidence of substantial financial difficulty, we can find no triable issue over Great American's assertion that unprofitability concerns fueled its decision to lay off LeBlanc and the others. The question for a jury would not be whether Great American's finances, viewed by one yardstick, might arguably be seen by someone else in a more optimistic light than did its managers, but whether there was evidence of profitable performance sufficient to permit a reasonable jury to infer that Great American's proffered pessimistic analysis - given as a reason for the layoffs -- was a mere pretense. Viewing all the financial evidence together, including the GAYAR data, we think a jury would lack any rational basis from this evidence to conclude that Great American's assertions of financial concern, as a basis for the discharges, were a sham.

Finally, LeBlanc argues that further evidence of the pretextual nature of Great American's explanation for terminating LeBlanc lies in the fact that Al Conte did not consult with Bruce Rutherford, the branch manager of the Lancaster office and the person to whom LeBlanc reported, before he made the final decision to

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[10] This loss appears to be particularly severe when compared to the $111 thousand calendar year underwriting profit that the Northeast Zone realized in 1989.

dismiss LeBlanc. In addition, LeBlanc asserts that Joseph Klimas, the vice-president in charge of personnel for the Northeast Zone, did not learn about LeBlanc's impending dismissal until one week before it was officially announced. Although Conte might have been well served to consult these people before he decided to discharge LeBlanc, we are not persuaded that this evidence either undermines the justifications given by Great American for its decision to dismiss LeBlanc or shows that Great American or Conte was motivated by age animus. As we stated in Mesnick v. General Electric Co., "Courts may not sit as super personnel departments, assessing the merits-or even the rationality-of employers' nondiscriminatory business decisions." 950 F.2d at 825. LeBlanc points to nothing in the record to suggest why Conte, who, in January 1989, approved LeBlanc's transfer, at Great American's expense, to eastern Massachusetts and his corresponding sixteen percent pay raise, would develop an aversion to older people less than two years later, especially where he chose to retain DeMartino, the other AOR in eastern Massachusetts, who was only a year younger than the fifty-nine-year-old LeBlanc. See Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 175 (8th Cir. 1992); Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) ("[I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer."). We note that Conte, himself, was nearly sixty years old when he decided to terminate LeBlanc and the others.

b. Statistical Evidence

LeBlanc offers statistical evidence of Great American's employment practices that he claims would

allow a reasonable trier of fact to infer that Great American's decision to terminate him constituted an act of illegal age discrimination. The district court, however, found otherwise. It ruled that, in light of the totality of the record, LeBlanc's statistical evidence was insufficient as a matter of law to demonstrate that Great American wrongfully considered age in its decision to dismiss LeBlanc. We agree with the district court.

In a disparate treatment case such as LeBlanc's,[11] the central focus "is less whether a pattern of discrimination existed [at the company] and more how a particular individual was treated, and why." Cumpiano v. Banco Santander P.R., 902 F.2d 148, 156 (1st Cir. 1990). As such, statistical evidence of a company's general hiring patterns, although relevant, carries less probative weight than it does in a disparate impact case.[12] See Id.; Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 184 n.3 (1st Cir. 1989) (questioning how statistics showing a low percentage of African Americans and women at A & P would have been admissible in a disparate treatment case). In this context, statistical evidence in a disparate treatment case, in and of

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[11] A "disparate treatment" cause of action accrues "when an employer treats an employee less favorably than others because of her race, color, religion, sex, [] national origin," or age.
Cumpiano v. Banco Santander P.R., 902 F.2d 148, 156 (1st Cir. 1990).

[12] Disparate impact actions arise "from employment practices, often facially neutral, which (1) cannot be justified by business necessity and (2) in fact impose harsher burdens on employees who share a protected characteristic." Cumpiano, 902 F.2d at 156.

itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its decision to dismiss an individual employee. See Waltner v. Lone Star Gas Co., 977 F.2d 161, 162 (5th Cir. 1992). This is because a company's overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer when dismissing a particular individual. Gadson v. Concord Hosp., 966 F.2d 32, 35 (1st Cir. 1992). "Without an indication of a connection between the statistics," the practices of the employer, and the employee's case, statistics alone are likely to be inadequate to show that the employer's decision to discharge the employee was impermissibly based on age. Id.

In the instant case, we do not think that LeBlanc's statistical evidence would allow a reasonable trier of fact to infer that Great American engaged in illegal age discrimination against LeBlanc. The statistics themselves are of questionable import, and they stand precariously unsupported by other probative evidence of age discrimination. There is, moreover, no evidence whatsoever to connect the statistics to Great American's specific decision to dismiss LeBlanc.

The flaws in the statistical evidence itself are notable. First, the comparison of LeBlanc's age with the distribution of ages in various groups of AORs in the Northeast Zone from 1989 through 1991 fails to provide important information regarding the pool of applicants. We are not told whether "qualified older employees were available or applied for those jobs." Simpson v. Midland-Ross Corp., 823 F.2d 937, 943 (6th Cir. 1987). Indeed, the fact that recently hired AORs are younger than LeBlanc is not necessarily evidence of discriminatory intent, but may simply reflect a younger available work force.

Second, LeBlanc's statistics that compare the ages of the employees who left Great American for any reason from 1989 through 1991 with the ages of Great American employees who kept their jobs during the period fail to distinguish voluntary from involuntary departures. Voluntary departures obviously have no bearing on whether Great American engaged in age discrimination. See Id. (improper to include "all who left the company during the relevant period even though they might have retired or accepted jobs elsewhere"). In addition, of the twenty-two people who left Great American either voluntarily or involuntarily during the three-year period, seventeen left in 1991, the year following LeBlanc's dismissal. Significantly, the average age of those seventeen people was actually younger than the average age of the employees who stayed with Great American.[13] We cannot see how the data from 1991 demonstrates any pattern of age discrimination whatsoever. Accordingly, if we disregard the data from 1991, LeBlanc's statistics are based on the departure of only five employees, including LeBlanc, over two years from an average annual employee population in the Northeast Zone of approximately 215 people. "[S]uch a small statistical sample carries little or no probative force to show discrimination." Fallis v. Kerr-McGee Corp., 944 F.2d 743, 746 (10th Cir. 1991); see Simpson v. Midland-Ross Corp., 823 F. 2d 937, 943 (6th Cir. 1987); Senqupta

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[13] Even when the 1990 hires and the trainees, who are presumably younger in age than other employees, are excluded from the employee pool during the three-year period, the statistical comparisons between jobs that were eliminated and jobs that were not eliminated in 1991 do not raise an inference of age discrimination.

v. Morrison-Knudsen Co., 804 F.2d 1072, 1075-76 (9th Cir. 1986); Coates v. Johnson & Johnson, 756 F. 2d 524, 541 (7th Cir. 1985); Haskell v. Kaman Corp., 743 F. 2d 113, 121 (2d Cir. 1984). We conclude that LeBlanc's statistical evidence does not provide a sufficient basis for a reasonable jury to find that Great American terminated LeBlanc because of his age.

IV.
CONCLUSION

On the record before us, we find that LeBlanc has adduced insufficient evidence for a reasonable trier of fact to infer that Great American's decision to terminate his employment in October 1990 was motivated by age animus. In other words, "[t]he evidence presented by [LeBlanc], viewed in the light most favorable to him, [fails] to create a genuine issue of material fact as to whether 'but for his employer's motive to discriminate against him because of his age, [LeBlanc] would not have been discharged.'" Menard v. First Sec. Servs. Corp., 848 F.2d 281, 289 (1st Cir. 1988) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979)). Indeed, LeBlanc's arguments are based largely upon conclusory allegations, improbable inferences, and unsupported speculation. The district court's decision to enter summary judgment in Great American's favor was proper.

Affirmed. Costs to appellees.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1050

THEODORE LEBLANC,

Plaintiff, Appellant,

v.

GREAT AMERICAN INSURANCE COMPANY,

Defendant, Appellee.

ERRATA SHEET

The opinion of this court issued on September 29, 1993, is amended as follows:

Page 2, line 8: add "," after " . . . 1993)"

Page 2, section I., line 4: insert "of this case" after "history"

Page 2, third line from the bottom: delete "," after "appeal"

Page 3, line 12: add ", 1992," after December 21

Page 4, line 13: delete "Id." and insert "Id.; see"

Page 6, line 8: delete the sentence beginning with, "This conclusion . . . judgment."

Page 9, section III., line 2: add a "," after "court"

Page 12, footnote 2: delete the last two sentences beginning with, "Lack of reference to the . . . (1986))."

Page 13, line 3: add "the" before "plaintiff"

Page 13, line 4: add "the" before "plaintiff"

Page 13, line 11: add "the" before "plaintiff"

Page 13, line 13: add "the" before "plaintiff"

Page 20, line 9-10: delete "acting President" and insert "then-acting president"

Page 26, footnote 8: delete "include" and insert "were"

Page 32, line 10: delete the "s" from "demonstrates"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1050

THEODORE L. LEBLANC,
Plaintiff, Appellant,

v.

GREAT AMERICAN INSURANCE COMPANY,
Defendant, Appellee

Judgment

Entered: September 29, 1993

This cause came on to be heard on appeal from the United States District Court of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: **The judgment of the District Court is affirmed.**

By The Court

/STAMPED/FRANCIS P. SCIGLIANO

FRANCIS P. SCIGLIANO, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1050

THEODORE L. LeBLANC,
Plaintiff, Appellant,

v.

GREAT AMERICAN INSURANCE COMPANY,
Defendant, Appellee

ORDER OF COURT

Entered October 25, 1993

The panel, having considered appellant's petition for rehearing, finds no basis for changing its opinion. The arguments now presented were fully considered by the panel. Appellant misstates the court's position in ascribing to it the notion that "the evidence in support of plaintiff's prima facie case . . . vanish[es] from the radar screen." We said the presumption drops out of the picture, but made it clear that evidence of pretext and elements of the prima facie case remain to be considered by the trier of fact in deciding whether thre was intentional discrimination. Petitioner points to a minor error which leads us to modify the opinion as follows:

- On page 32, line 4: delete "who left" and insert "whose jobs were eliminated by" after the word "people"

- On page 21, line 4: delete "either"

- On page 32, line 5: delete "voluntarily or involuntarily"

- On page 32, line 6: delete "left" and insert "of those positions were eliminated" after "seventeen"

- On page 32, lines 8-9: delete "who stayed with" and insert "whose jobs were not eliminated by" after "employees" on line 8

- On page 32, line 12: replace the word "departure" with "dismissal"

Petition Denied.

By the Court:

Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 91-12935-Y

****

THEODORE L. LeBLANC,

Plaintiff,

v.

GREAT AMERICAN INSURANCE COMPANIES,

Defendant.

****

MOTION HEARING

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

PHILLIPS and PHELAN (By Walter M. Phillips, Jr., Esq.), Suite 1600, The North American Building, 121 South Broad Street, Philadelphia, Pennsylvania 19107, on behalf of Theodore L. LeBlanc.

FOX and GROVE, CHARTERED, (By Kalvin M. Grove, Esq. and Joel W. Rice, Esq.), Suite 6200, 311 South Wacker Drive, Chicago, Illinois 60606, on behalf of Great American Insurance Companies

Post Office & Courthouse
Boston, Massachusetts 02109

November 2, 1992

THE COURT: All right. The motion for summary judgment is allowed. It's allowed on two alternative bases. And I think this gives the plaintiff the best possible record should an appeal be taken.

The Court accepts the factual data upon which the plaintiff's expert, Mr. Cobb, bases his report. But after the most careful and searching analysis of that report, the Court rules as matter of law, because of course I can not evaluate it as matter of fact on a motion for summary judgment, but rather as matter of law the Court rules that it is flawed with the fallacy of post hoc ergo propter hoc reasoning; that is, after this, therefore, on account of this. There's no doubt that the plaintiff LeBlanc was decades older than most of the other AOR's who held similar positions at the time his job was eliminated. I accept that. I also accept the conclusion of Mr. Cobb for purposes of this motion, in the next sentence, I'm reading from the summary: Moreover, Leblanc was decades older than the average for every one of five variously defined groups of employees hired into AOR positions at roughly this time that the decision was made to eliminate his own job. And I'll accept that. But, I rule as matter of law that does not make out a prima facie case of age discrimination when Mr. LeBlanc is discharged and, therefore, summary judgment must be granted for Great America.

Alternatively, even if it does make out a sufficient prima facie evidence of age discrimination, to shift to Great American the burden of going forward, in this case, I rule, again as matter of law, that Great American has met that burden with its ostensibly age neutral ground for discharge; and I further rule that the Cobb report is insufficient as matter of law to show, to demonstrate the age based animus on the totality of this record that would negate the reason that Great American proffered.

But, while I, I find that, I rule that the conclusions of the Cobb report, this so-called pattern and practice of age

discrimination, are simply insupportable as matter of law on this record, I do accept in making that ruling each of the factual findings made by Mr. Cobb and I do not challenge in any way the factual state of the record. But, believing that the law in this circuit is that in order to get behind that ostensibly neutral exposition of the reason for the discharge, I rule that this statistical evidence is simply inadequate as matter of law.

And, Mr. Phillips, if there's to be an appeal, I'll let you take me up on that because that's the basis for my rulings.

Any questions? So we're clear I want you to have an appropriate record. Any questions?

MR. PHILLIPS: No, your Honor.

MR. GROVE: No.

THE COURT: Very well, that's the order of the Court. Judgment for the defendant. We'll recess.

(Adjournment)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LeBLANC

v. CIVIL ACTION

GREAT AMERICAN No. 91-12935-Y

JUDGMENT

Young D.J.

In accordance with the Court's Order dated November 2, 1992 granting defendant's motion for summary judgment in the above-entitled action, it is hereby ORDERED:

Judgment for the Defendant.

By the Court,

November 2, 1992
Date

(s) Elizabeth Smith
Deputy Clerk

[A 000263]

December 21, 1992

"Plaintiff's Motion for Reconsideration is Denied for the reason set forth in the defendant's memorandum."

William G. Young, D.J.

Interrogatory No. 17:

State whether Great American considers plaintiff's layoff as part of a reduction in force.

Response:

Yes.

1991 NORTHEAST EXEMPT
POSITIONS AS OF 12/31/91

DIV	LOC	DEPT
0012	026M	376

NAME:-	LeBlanc, Theodore	DeMartino, Charles
TITLE:	Sr. Agency Operations Rep.	Assistant Vice President
GRD:	028	000
DOB:	31/07/18	32/03/11
DOH:	80/10/20	75/11/24
DOT:	91/07/19	
TERM RSN:	RETIRE	

3RD CASE of Level 1 printed in FULL format.

MARION BOJDA, Plaintiff-Appellant, v. BLACK DOT GRAPHICS, INC., Defendant-Appellee.

No. 92-4117

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1994 U.S. App. LEXIS 117

September 30, 1993, n1 Submitted

n1 After preliminary examination of the briefs, the courtnotified the parties that it had tentatively concluded thatoral argument would not be helpful to the court in thiscase. The notice provided that any party might file a"Statement as to Need of oral Argument." See Fed. R. App. P.34(a); Circuit Rule 34(f). No such statement having beenfiled, the appeal has been submitted on the briefs and record.

January 5, 1994, Decided

NOTICE: [*1] UNPUBLISHED ORDER NOT TO BE CITED PER SEVENTH CIRCUIT RULE 53.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 91 C 6331. Harry D. Leinenweber, Judge

DISPOSITION: AFFIRMED.

JUDGES: Before Hon. RICHARD A. POSNER, Chief Judge, Hon. WALTER J. CUMMINGS, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge

OPINION: ORDER

Marion Bojda, 52 years old, was permanently laid off from his job of 12 years as a proofreader by his employer,

defendant Black Dot Graphics, Inc., when their plant closed. Plaintiff filed suit under the Age Discrimination in Employment Act (ADEA) , 29 U.S.C. @@ 621 et seq, n2 on the basis that defendant retained two proofreaders, transferring them to a different site, and both were under 40 years of age. The district court entered summary judgment in favor of defendant, finding that plaintiff failed to raise a genuine issue of material fact on the question of whether defendant's age-neutral reason for terminating plaintiff was pretextual. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). [*2] See also Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1219 (7th Cir. 1980) (Title VII racial discrimination analysis extended to age cases), cert. denied, 450 U.S. 959 (1981).

- - - - - - - - - - - - - - -Footnotes - - - - - - - - - - - - - - - -

n2 Count II of the complaint, a handicap discrimination claim under the Illinois Human Rights Act, was dismissed, and plaintiff does not appeal from that dismissal.

1994 U.S. App. LEXIS 117, *2

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Our review of an order granting summary judgment is de novo. Lohorn v. Michal, 913 F.2d 327 (7th Cir. 1990). To uphold a grant of summary judgment, we view the record and all inferences drawn from it in a light most favorable to plaintiff, as the party opposing the motion. Id. Summary judgment is only proper where no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Plaintiff contends that the district court required plaintiff to prove pretext rather than merely establish a genuine issue of material [*3] fact on the issue. Plaintiff misunderstands the burdens of summary judgment and the overlaying burdens imposed by the substantive law of employment discrimination. See Moore v. Eli Lilly & Co.,

990 F.2d 812, 816 (5th Cir.) (plaintiff "misapprehended the burden shifting process," and seemed "to argue that he [had] no pretext burden at all"), cert. denied, 62 U.S.L.W. 3348 (1993).

In an employment discrimination case, where plaintiff chooses to establish his claim by using the burden-shifting method of McDonnell-Douglas, and defendant moves for summary judgment, defendant in effect must show that at trial it would be entitled to a directed verdict. The summary judgment standard mirrors that of a directed verdict test, i.e., if what is contained in the affidavits, pleadings, depositions and other materials were all the evidence before the court, and upon such evidence there would be nothing left to go to a jury and the court would be required to direct a verdict, then summary judgment should be entered. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52 (1986) Perfetti v. First National Bank of Chicago, 950 F.2d 449, 456 (7th Cir. 1991), [*4] cert. denied, 112 S. Ct. 2995 [(1992)]. n3

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n3 Of course, summary judgment differs from a directed verdict in that affidavit evidence cannot be cross-examined and the credibility of witnesses cannot be judged by a trier of fact. Nevertheless, determining whether a defendant has met its burden of production, successfully rebutting a legal presumption of intentional discrimination raised by plaintiff's prima facie case, "can involve no credibility assessment. For the burden-of-production determination necessarily precedes the credibility-assessment stage." St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2748 (1993).

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Here, plaintiff does not dispute that defendant carried its burden of production by offering facts explaining why plaintiff was laid off while other, younger proofreaders were retained. At this point, plaintiff, as the non-moving party in

a summary judgment proceedings, was required to counter with materials which raised a factual dispute [*5] as to the material issue of pretext. Any respondent to a summary judgment motion has this responsibility. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (opponent to summary judgment must affirmatively demonstrate by specific factual showing that a genuine issue of fact requires trial). Plaintiff's duty here, however, was greater because he brought the suit and therefore retained the burden of persuasion at all times. He cannot sit idly and wait until trial begins, hoping some decent evidence will surface by that time. Plaintiff "should not be allowed to proceed with a case on the mere hope that trial would produce evidence he was unable to garner at the stage of summary judgment." Dale v. Chicago Tribune Co., 797 F.2d 458, 465 (7th Cir. 1986), cert. denied, 479 U.S. 1066 (1987), quoting Parker v. Federal National Mortgage Association, 741 F.2d 975, 980 (7th Cir. 1984). Consequently, the fact that plaintiff need not prove every material fact at the summary judgment stage does not mean he need not even offer some facts which show a dispute exists. [*6] Plaintiff's error lies in his attempt to use his prima facie case to meet his second evidentiary burden of demonstrating a genuine issue of material fact regarding pretext. n4 The purpose of Burdine was not to allow plaintiff to go to the jury without presenting any evidence at all; its purpose was to allow plaintiffs to prove discrimination without presenting any evidence of discrimination, and solely with evidence of pretext." Perfetti, 950 F.2d at 452. Thus, after defendant proffers its age-neutral reasons, the "McDonnell Douglas framework . . . is no longer relevant," the "presumption simply drops out of the picture" (St. Mary's Honor Center, 113 S. Ct. at 2749), and plaintiff then must carry both the burden of persuasion (which has never shifted) and of production. n5

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n4 That is not to say that a prima facie case will have no effect on the verdict. Plaintiff may have anticapatorily demonstrated pretext in his prima facie case. See St. Mary's Honor Center v. Hicks.

n5 Compare disparate impact claims, where both the burden of production and the burden of persuasion shift to the employer to show that the practice is job-related and consistent with business necessity. This court has thus far declined to decide whether these 1991 amendments to the Civil Rights Act have any bearing on the ADEA. Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1245 n.4 (7th Cir. 1992).

- - - - - - - - - - - - - - - - -End Footnotes - - - - - - - - - - - -

We go on then to examine de novo the evidence of record to determine whether genuine issues of material fact exist. Plaintiff argues that three areas of evidence indicate that genuine issues of material fact exist regarding whether he was laid off on the basis of his age. First, he maintains that "statistical inferences show[] that the December discharges adversely impacted older employees." The cumulative effect of the two RIFs n6 was that 33 proofreaders were laid off; 14 were under age forty, and 19 were over age forty. These numbers would not permit a reasonable jury to conclude that age was a factor in plaintiff's discharge.

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n6 One reduction in force (RIF) occurred in June 1989, and another in December 1989.

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The second area of evidence plaintiff points to involves defendant's methods for determining who were the "best people" it should retain after each RIF. Plaintiff argues that defendant's claim that it could only keep its "best people" is belied by the lack of "objective or agreed upon criteria by which [*8] to judge who was retained and who was not." n7 Plaintiff adds: "Black Dot had no job

evaluation system and did not consult performance evaluations."

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n7 Plaintiff also refers to "long-settled law than an employer's use of subjective job criteria tends to adversely affect those in the legally protected categories." Plaintiff offers no citations for this long-settled law, and this court is not aware of any support for the stated proposition.

- - - - - - - - - - - - - -End Footnotes - - - - - - - - - - - - - -

We acknowledge the danger of employers who use subjective factors to "camouflage discrimination." Namenwirth v. Board of Regents of U. of Wisc. System, 769 F.2d 1235, 1243 (7th Cir. 1985), cert. denied, 474 U.S. 1061 (1986). An employer may, however, rely on subjective judgment about plaintiff's capabilities even where a plaintiff was objectively superior to an employee who was not fired. Perfetti, 950 F.2d at 457, citing, Christie v. Foremost Ins. Co., 785 F.2d 584, 586-87 (7th Cir. 1986) [*9] (upholding jury finding that employer's reason of "standard policy" was pretextual were plaintiff produced evidence that employer's own managers did not know of policy). See also Konowitz v. Schnadig Corp., 965 F.2d 230, 234 (7th Cir. 1992) (the "absence of written guidelines for carrying out the RIF is irrelevant"); Weihaupt v. American Medical Ass'n, 874 F.2d 419, 429 (7th Cir. 1989) (mere fact that employer's beliefs were based on subjective factors fails to establish that their assessment of employee's skills were made in bad faith); Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1427 (7th Cir. 1986) (a "subjective qualification assessment does not convert an otherwise legitimate reason into an illegitimate one"). Plaintiff here has failed to show that any subjective facts defendant might have relied upon were insufficient to justify the employer's hiring decision.

The third and last area of evidence plaintiff points to in order to establish a factual dispute involves the reasons for

keeping the two under-40 proofreaders instead of retaining plaintiff. Plaintiff, without citation to the record, [*10] argues that Lynn Barker and William Sorge both had "less experience as a proofreader" than plaintiff. Defendant, however, supplied specific facts detailing the experience of Barker and Sorge. Sorge, 34 years old, had worked as a supervisor with defendant, and thus had management experience which O'Brien thought could "prove valuable." Prior to becoming a supervisor, he had apprenticed at defendant's (still open) AGS as an ad work proofreader, and had worked at AGS full-time. O'Brien concluded that Sorge "had better, more extensive, and more recent experience and training in ad work than plaintiff had." Barker, also 34 years old, had experience as a management employee, and had worked on a specialized retail account that was absorbed by AGS after defendant's other plant closed. In contrast, plaintiff normally did not perform ad work, n8 and did not have the flexibility of having worked on numerous other retail accounts that survived the one plant's closing and were transferred to the AGS plant.

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n8 Retail work is considered more routine and repetitive, while ad work is more customized and variable. Ad work requires more work for proofreaders because it involves many different typefaces and contours (moving printed text around photographs and artwork).

- - - - - - - - - - - - - -End Footnotes - - - - - - - - - - - - -

[*11]

Plaintiff failed to refute these facts. Consequently, under Local Rule 12 of the Northern District of Illinois, which the courts apply strictly (Valenti v. Qualex, Inc., 970 F-2d 363, 368 (7th Cir. 1992)), the uncontradicted facts are deemed admitted. A flat denial, without reference to supporting materials, is insufficient under Rule 12. Id. Defendant had no complaints about plaintiff's work performance. It simply found that the two under-40

employees brought a broader and more flexible base of experience, something defendant needed after the two major RIFS. After all, the "essence of a RIF is that competent employees who in more prosperous times would continue and flourish at a company may nevertheless have to be fired." Healy v. New York Life Ins. Co., 860 F.2d 1209, 1220 (3d Cir. 1988), cert. denied, 490 U.S. lo98 (1989). The company incurs no duty to transfer employees to another position within the company. Simpson v. midland-Ross Corp., 823 F.2d 937, 942 n.6 (6th Cir- 1987). moreover, if plaintiff's evidence here were considered sufficient to withstand [*12] summary judgment, it "would effectively prohibit employers from planning and implementing RIFs if the reductions affected employees in the protected age group." Earley v. Champion Intern. Corp., 907 F.2d 1077, 1083 n.4 (11th Cir. 1990).

Finally, even if defendant did terminate plaintiff under the mistaken belief that he had less experience at ad work, or less flexibility on other accounts, or even if defendant failed in its attempt to retain its "best people," it does not establish a causal connection between the termination and age discrimination. n9 "The question is not whether the ratings [or evaluations] were right but whether the employer's description of its reasons is honest." Gustovich v. AT & T Communications, Inc., 972 F.2d 845, 848 (7th Cir. 1992) (the ADEA "should not be mistaken for a labor arbitrator. Incorrect ratings are not age discrimination"); Dorsch, 782 F.2d at 1426. A business termination which is ill-informed or ill-considered is not a pretext for age discrimination. Lindsey v. Baxter Healthcare Corp., 962 F.2d 586, 588 (7th Cir.) [*13] ("agediscrimination law does not shift responsibility for corporate personnel decisions from corporations to trial lawyers"), cert. denied, 113 S. Ct. 442 (1992); Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 559 (7th Cir.) cert. denied, 484 U.S. 977 (1987).

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n9 After an exhaustive study of age discrimination cases, and in "the hope of forestalling the unnecessary expenditure of plaintiffs' funds and judicial resources through the filing of flawed age discrimination cases," the Fifth Circuit recently concluded that the "most prevalent flaw in the losing plaintiffs' evidence is the absence of proof of nexus between the firing (or failure to promote) and the allegedly discriminatory acts of the employer." Moore, 990 F.2d at 817, n.24.

- - - - - - - - - - - - -End Footnotes - - - - - - - - - - - - - - - -

Even viewing the record and all inferences drawn from it in a light most favorable to plaintiff, we cannot find any genuine issues of material fact. The district [*14] court properly entered summary judgment in favor of defendant. For these reasons, the judgment of the district court is AFFIRMED.

1993 U.S. App. LEXIS 31886 printed in FULL format.
JOSEPH BOOKER, Plaintiff-Appellant, v. C.R. INDUSTRIES,
INC., Defendant-Appellee.
No. 93-1218
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
1993 U.S. App. LEXIS 31886
October 25, 1993, Submitted *

* On September 24, 1993, the parties filed an Agreed Motion to waive oral Argument in this case. That motion was grantedon September 29, 1993 the oral argument set for October 25,1993, was vacated, and the appeal has been submitted on thebriefs.

December 6, 1993, Decided

NOTICE: [*1] UNPUBLISHED ORDER NOT TO BE CITED PER SEVENTH CIRCUIT RULE 53.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 92 C 1554. George M. Marovich, Judge.

DISPOSITION: AFFIRMED.

JUDGES: Before Hon. RICHARD A. POSNER, Chief Judge, Hon. DANIEL A. MANION, Circuit Judge, Hon. ROBERT A. GRANTED, Senior District Judge **

** The Honorable Robert A. Grant, Senior District Judge, United States District Court for the Northern District of Indiana, is sitting by designation.

OPINION: ORDER

Plaintiff, Joseph Booker, filed an employment discrimination suit in the district court alleging that he had been demoted and discharged from his employment at C.R. Industries, Inc. ("CRI") in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. @ 623. CRI filed a motion for summary judgment and a Statement of Uncontested Material Facts in accordance with Local District Court Rule 12(m) on October 21, 1992. On

December 29, 1992, the district court granted CRI's motion, and this appeal followed. For the following reasons, the judgment of the district court is AFFIRMED.

I. BACKGROUND

Booker was hired by CRI in 1974. From [*2] May 1986 to September 1990, he worked as a facilities engineer. In that capacity, Booker earned $ 40,000 a year and managed capital facility renovation projects, working as a construction project manager and liaison between the company and outside contractors. After Booker's primary project, a technology center, wound down in 1989, his work load decreased and he began asking for additional work. Booker was not the only engineer in need of work at CRI. According to Booker, Frank Surowka, a manufacturing engineer who was hired in May 1990, also had little to do.

In September 1990, CRI decided it was time to reduce the size of its engineering group. on September 28, 1990, Roy Sample, the Manager of Facilities, called Booker into his office and told him that his job was being eliminated and that he could take the job of night shift supervisor at the same salary if he wanted it. Although the night shift supervisor position had been eliminated several years earlier, CRI apparently was willing to recreate the position for Booker. Booker considered the new position a "dead-end" job, but accepted CRI's offer. When he asked Sample why Surowka, a "younger" employee at age 40, was being retained [*3] rather than him, Sample told him that he "considered Frank Surowka more qualified" and that Surowka had "better project experience." Four months later, on January 25, 1991, Booker received written notice from Will Mixon, CRI's Vice-President of Manufacturing, telling him that his position was being eliminated effective immediately "due to reduced business activity, and our forecast of activity of the specific industries that we serve."

Booker ultimately filed suit in federal district court alleging that his demotion to night shift supervisor in September 1990 and his discharge in January 1991 violated the ADEA. CRI moved for summary judgment, and submitted its Statement of Uncontested Material Facts in accordance with Local District Court Rule 12(m). Booker did not respond within the time specified by the district court. n1

- - - - - - - - - - - - - -Footnotes - - - - - - - - - - - - - - - - - -

n1 CRI's motion to strike Exhibit 2 of Booker's reply brief currently pends before this court. Exhibit 2, a motion for extension of time to respond to CRI's motion for summary judgment, was not filed in the district court, was not made a part of the record before the district court either before or after it issued its decision, and does not constitute a part of the record on appeal. Fed. R. App. P. 10(a). Although Rule 10(e) provides the mechanism by which the record on appeal may be supplemented to correct any material omissions, Booker has failed to avail himself of those procedures. Under the circumstances, CRI's motion to strike is GRANTED. See U.S. ex rel Kellogg v. McBee, 452 F.2d 134, 137 (7th Cir. 1971); Union Asbestos & Rubber Co. v. Evans Products Co., 328 F.2d 949, 950 n.4 (7th Cir. 1964).

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-[*4]

Consistent with this court's interpretation of Local District Court Rule 12, Judge Marovich deemed all facts asserted in CRI's uncontested Rule 12(m) statement admitted. See Tobey v. Extel/JWP, Inc., 985 F.2d 330, 333 (7th Cir. 1993); Schulz v. Serfilco, Ltd., 965 F.2d 516, 518-19 (7th Cir. 1992). Included among those admissions were the following two paragraphs:

6. ". . . During January, 1991 (CRI] laid off a number of other employees from all plants because of the poor

economy, according to the Company." Plaintiff . . . was advised by [CRI] in writing that "Effective January 25th, 1991, [his] position [was] being eliminated due to reduced business activity, and [CRI's] forecast of the specific industries that [it] served" . . . "No one [replaced Booker in the night shift supervisor position]."

* * *

10. . . . [CRI] articulated to [Booker] the business reason for [his demotion]: "the facilities engineering group was going to have to be reduced" and . . . Roy Sample, "said that he considered Frank Surowka more qualified." "When [Booker] asked management why Surowka was being retained as a facilities engineer rather [*5] than [him], [he] was told Surowka and 'better project experience.'"

The district court found that CRI had thus satisfied its burden of articulating legitimate, nondiscriminatory reasons for demoting and discharging Booker, and that Booker had failed to show that CRI's stated reasons were merely a pretext for discrimination.

II. ARGUMENTS

Booker disagrees. Although he apparently concedes the fact that his discharge was the result of a reduction-in-force affecting both young and old alike and necessitated by the economy, Booker contends that "there is a wealth of evidence . . . revealing pretext in the company's articulated reason for demoting [him] rather than Surowka to the night shift position." He cites as examples:

(1) the fact that the night shift supervisor position had been eliminated several years earlier, and was temporarily re-established for him in September 1990; n2 and

- - - - - - - - - - - - - -Footnotes - - - - - - - - - - - - - - - -

n2 Booker believes the position was resurrected as a "temporary repository for him "to soften the appearance of favoring a younger engineer [Surowka] . . ."

- - - - - - - - - - - - - -End Footnotes - - - - - - - - - - - - - - -

[*6]

(2) statements made during the course of his own deposition on August 14, 1992 to the effect that Surowka was not better qualified for the engineering position; that Surowka was the "more appropriate" candidate for the night shift supervisor position and should have been transferred there instead of him; and that while he didn't know how the company made the lay-off decisions in January 1991, he thought seniority should have had something to do with it.

III. STANDARD OF REVIEW

We review the grant of summary judgment de novo, "without deference for the view of the district court and hence almost as if the motion had been made to us directly. Tobey, 985 F.2d at 332. We must determine whether a reasonable factfinder could find in favor of the party opposing the motion for summary judgment based on the record before us. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Tobey, 985 F.2d at 332.

IV. DISCUSSION

Whether Booker could have established a prima facie case of discrimination is not material to the outcome of this case. We assume for the sake of argument that he could. [*7] n3 The district court made the same assumption and shifted the burden to CRI to produce legitimate, nondiscriminatory reasons for its actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981); MCDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The court found that CRI satisfied its burden when it produced various documents tending to show that its engineering group had to be reduced for economic reasons; that it retained Surowka as a manufacturing engineer because he was more qualified and had better project experience; and that it discharged Booker "due to reduced business activity, and [CRI's] forecast of the specific industries that [it] served." n4 The law requires nothing more.

The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.

Burdine, 450 U.S. at 254-55. See also Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1244 (7th Cir. 1992); [*8] Heerdink v. Amoco Oil Co., 919 F.2d 1256, 1260 (7th Cir. 1990), cert. denied, U.S. 111 S.Ct. 2826, 115 L.Ed.2d 996 (1991).

- - - - - - - - - - - - - - - -Footnotes - - - - - - - - - - - - - - - -

n3 Under the indirect method of proving disparate treatment in an ADEA reduction-in-force ("RIF") case such as Booker's, the plaintiff must show that (1) he was within the protected age group (over the age of 40); (2) he was performing according to his employer's legitimate expectations; (3) he was discharged (or demoted); and, (4) other similarly situated employees who were not in the protected class were treated more favorably (i.e., not discharged, "bumped", or demoted). Oxman v. WLS-TV, 846 F.2d 448, 455 (7th Cir. 1988). Booker clearly satisfied the first three elements, and probably could have satisfied the fourth had he responded to CRI's motion. See Oxman, 846 F.2d at 455; Matthews v. Allis-Chalmers, 769 F.2d 1215, 1223 (7th Cir. 1985).

n4 In addition to the admissions in CRI's Statement of Uncontested Material Facts, CRI submitted excerpts from Booker's August 14, 1992 deposition, documents from Booker's personnel file, various handwritten statements by Booker, and the notice of termination dated January 25, 1991.

- - - - - - - - - - - - - - -End Footnotes - - - - - - - - - - - - - - -

[*9]

The legal presumption of intentional discrimination created by Booker's prima facie showing was rebutted and dropped from the case once CRI met its burden of

production, and Booker was left with the ultimate burden of proving that CRI's stated reasons were really a pretext for age discrimination. See St. Mary's Honor Center v. Hicks, U.S., 113 S.Ct. 2742, 2747, 2749, 125 L.Ed.2d 407 (1993); Burdine, 450 U.S. at 255 n.10. To do so, he must prove that CRI's proffered explanations for its adverse employment decisions were false (that they were not the "true reason"), and that age was a determinative factor in CRI's decision-making process. St. Mary's Honor Center, 113 S.Ct. at 2752; Hazen Paper Co. v. Biggins, U.S., 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338 (1993); U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983); Benzies v. Illinois Dept. of Mental Health and Developmental Disabilities, 810 F.2d 146, 148-49 [*10] (7th Cir.), cert. denied, 483 U.S. 1006 (1987). The district court found that Booker failed to meet that burden and we agree.

On appeal, Booker does not challenge CRI's reasons for discharging him on January 25, 1991, but rather focuses on CRI's reasons for demoting him to night shift supervisor, a decision which he says was "tantamount to a discharge." Roy Sample, Booker's supervisor at CRI, told Booker that Surowka was retained as the only engineer because he had "better project experience" and was "more qualified." Booker contends that Sample's statements are not true. In support of his claim, he refers the court to numerous self-serving statements in his deposition relating to what he perceives Surowka's qualifications and experience to be. Such statements, however, do not establish that the proffered reasons were a pretext for discrimination. See Gustovich v. AT&T Communications, Inc., 972 F.2d 845, 848 (7th Cir. 1992) ; Williams v. Williams Electronics, Inc., 856 F.2d 920, 924 (7th Cir. 1988); Dale v. Chicago Tribune Co., 797 F.2d 458, 464-65 (7th Cir. 1986), [*11] cert. denied, 479 U.S. 1066 (1987). "A desire to hire the more experienced or better qualified applicant is a nondiscriminatory, legitimate, and common reason on which to base a hiring

decision." Heerdink, 919 F.2d at 1260 (quoting Holder v. Old Ben Coal Co., 618 F.2d 1198, 1202 (7th Cir. 1980)). So too, pretext may not be inferred from the mere fact that CRI retained a younger engineer (Surowka), La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1412-13 (7th Cir. 1984); Monaco v. Fuddruckers, Inc., 1 F.3d 658, 661 (7th Cir. 1993), or was willing to create a new position for Booker when it eliminated the position of facilities engineer.

In the absence of any evidence tending to show that CRI's stated reasons for demoting and ultimately discharging Booker were false and that age was a determinative factor in CRI's decision-making process, CRI was entitled to judgment as a matter of law. St. Mary's Honor Center, 113 S.Ct. at 2752; Hazen Paper Co., 113 S.Ct. at 1706; [*12] Aikens, 460 U.S. at 716.

AFFIRMED.

1993 U.S. App. LEXIS 20286 printed in FULL format.

CHARLES A. KLINE, Plaintiff-Appellant, v. TENNESSEE VALLEYAUTHORITY, MARVIN RUNYON, JOHN B. WATERS, and WILLIAM H.KENNOY, Defendants-Appellees.

No. 92-5919

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1993 U.S. App. LEXIS 20286

July 29, 1993, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING INA PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: United States District Court for the Eastern District of Tennessee. District No. 91-00075. Jarvis, District Judge.

JUDGES: BEFORE: JONES and NELSON, Circuit Judges, and FRIEDMAN, District Judge. n1

n1 The Honorable Bernard A. Friedman, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION BY: PER CURIAM

OPINION: PER CURIAM. This is an employment discrimination case that comes to us on appeal from a summary judgment in favor of the Tennessee Valley Authority. The plaintiff, a 52-year-old black man, applied to TVA for a job that was given instead to a 38-year-old white woman. TVA subsequently reevaluated the qualifications of the two applicants, but allowed the woman to retain the job. Contending that the woman was in fact

less well qualified than he, the plaintiff asks us to determine whether the district court erred in concluding that there [*2] were no genuine issues as to any material fact. We believe that the record does disclose the existence of such an issue, and we shall therefore vacate the judgment and remand the case to the district court.

I

The plaintiff, Charles A. Kline, was employed by TVA in 1964 as a machinist apprentice. He worked as a machinist until May of 1977, at which time he became a personnel officer at TVA's Watts Bar nuclear plant. He remained in that position until September 30, 1988, when his employment was terminated pursuant to a reduction in force.

After his job had been targeted for elimination, Mr. Kline learned that a personnel position was open at the Kingston fossil fuel plant. He contacted Keith Leamon, Human Resource Manager for Power Production, to inquire about applying for the Kingston job. The following day, acting on Mr. Leamon's advice, Mr. Kline hand-delivered a resume to Kingston's plant manager, Ford Clayton It subsequently developed that Mr. Leamon had already prepared a list of candidates for the position, and Mr. Kline was not on the list.

Plant Manager Clayton told his secretary to take the plaintiff's resume to Johnnie Brown, the supervisor of the plant's services [*3] department, and ask Mr. Brown to "do something with this." What Mr. Brown did was to place the resume in a desk drawer. There it stayed until long after the job had been filled. Mr. Brown helped interview three finalists, but Mr. Kline was simply not considered for the position.

Randy Cole, who had been designated to succeed Mr. Clayton as plant manager, made the final selection. Mr. Cole received the list of candidates from Mr. Leamon and interviewed the finalists with Mr. Brown's help. Mr. Cole's

top choice, Pete Johnson, was offered the job on August 15, 1988; he turned it down. Mr. Cole's second choice was Carol Beckler, who accepted. Mr. Cole testified at his deposition that he did not know Mr. Kline was interested in the job.

Mr. Kline filed a formal complaint with TVA's Equal Employment office on October 31, 1988. On December 31, 1990, the Equal Employment office issued a decision in which it found that the plaintiff had been discriminated against "on the basis of age (52) and race (Black) when he was not considered for a Personnel officer, M-3, position at Kingston Steam Plant. . . ." A TVA vice president was ordered to reconstruct the selection criteria for the position, [*4] review the qualifications of both Ms. Beckler and Mr. Kline, and determine who had been better qualified for the job in 1988. Mr. Kline was to be given the job and awarded backpay if it turned out that his qualifications had been superior.

Not satisfied with this procedure, Mr. Kline filed the present action in federal district court in February of 1991. TVA went ahead with the "reselection" anyway, and issued a corrective action memorandum concluding that Ms. Beckler was better qualified than Mr. Kline. Both sides subsequently moved for summary judgment.

In an opinion and order issued on January 28, 1992, the district court granted partial summary judgment to the defendants. Because Mr. Cole's testimony that he had been unaware of Mr. Kline's interest in the job stood uncontradicted, the court concluded that summary judgment was appropriate "with respect to plaintiff's claim that he was discriminated against in connection with Cole's 1988 decision to hire Beckler." The court went on to note that "with respect to TVA's [Equal Employment Office] finding that plaintiff was discriminated against on the basis of his age and race when he was not considered for the position at the Kingston [*5] Plant, the court concludes that the relief

granted by TVA was proper and adequate." Finally, the court allowed the plaintiff leave to amend his complaint to allege that the reselection process had been discriminatory.

Mr. Kline then filed an amended complaint alleging race and age discrimination in the reselection. The district court ultimately granted summary judgment in favor of the defendants on this claim as well. Although the plaintiff had made out a prima facie case of both race and age discrimination, the court decided, he "failed to offer any material proof that defendant's stated reason for his nonselection was a mere pretext for unlawful discrimination." This appeal followed.

II

Title VII of the Civil Rights Act of 1964 provides in pertinent part as follows:

"It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. @ 20OOe-2(a).

Using [*6] a nearly identical formula, the Age Discrimination in Employment Act prohibits discrimination because of an individual's age. 29 U.S.C. @ 623(a)(1).

Both age and race discrimination claims are evaluated under similar approaches. The plaintiff bears the initial burden of establishing a prima facie case of discrimination. A presumption of discrimination arises if the plaintiff establishes such a case, and the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. The presumption disappears if the defendant articulates such a reason, and the plaintiff then must show that the articulated reason is merely a pretext for unlawful discrimination.

The elements of a prima facie case are similar in both contexts. Where the plaintiff alleges that the defendant failed to select him because of his age or race, the plaintiff may make out a prima facie case by showing that he was a member of a protected class, that he was not selected for the position, that he was qualified for the position, and that a person outside the class of protected persons was selected in his stead. Mitchell v. Toledo Hospital, 964 P.2d 577, 582 (6th Cir. 1992). [*7] Black people are protected under Title VII, and persons who are at least 40 years of age are protected under the Age Discrimination in Employment Act. 29 U.S.C. @ 631(a). The plaintiff may also establish a prima facie case by presenting "credible, direct evidence of

discriminatory intent," Mitchell, 964 F.2d at 582, n.4, but no such evidence was presented here.

Plaintiff Kline was a member of the class protected by the Age Discrimination in Employment Act, and the successful candidate, Carol Beckler, was not. Both Mr. Kline and Ms. Beckler were members of classes protected by Title VII, and both, it appears, were at least minimally qualified for the Kingston job. The district court concluded that Mr. Kline had made out a prima facie case of both race and age discrimination; for purposes of this appeal we shall assume the correctness of that conclusion without deciding the question.

The explanation tendered by TVA for the initial selection of Ms. Beckler instead of Mr. Kline was that the selecting official, Mr. Cole, did not know that Mr. Kline was a candidate for the job. Mr. Kline argues that there is a [*8] question of fact as to the validity of this explanation, given that various TVA managers other than Mr. Cole knew of Mr. Kline's interest. In light of the events that followed, we see no reason to decide the issue.

The district court did not take issue with the EEO's determination that Mr. Kline had been discriminated against in the original selection process by reason of TVA's failure even to consider him for the vacant position. The EEO concluded that the appropriate remedy would be to insure that Mr. Kline received consideration in a reselection process, and the district court saw nothing wrong in this. Neither do we. Both the Age Discrimination in Employment Act and Title VII grant broad discretionary power to fashion legal and equitable remedies. 29 U.S.C. @ 626(b); 42 U.S.C. @ 2000-5(g). See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-26, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975) (reviewing Title VII remedy to determine whether district court "abused its traditional discretion to locate a just result"). The plaintiff has not argued [*9] on appeal that this remedy represented an abuse of discretion as

far as the "failure to consider" portion of his claim was concerned. The outcome of the reselection process, however, may be more problematic.

Before turning to the substantive issue raised by the rejection of Mr. Kline in the reselection process, we note that there was some dispute in the district court, continued in the parties' appellate briefs, as to whether Mr. Kline was barred from contesting the outcome of the reselection because he had not challenged it in a timely administrative complaint or civil action. See 29 U.S.C. @ 633a(d) (Age Discrimination in Employment Act) (for federal employee, notice of intent to sue must be filed within 180 days of alleged unlawful practice); 42 U.S.C. @ 20OOe-16 (Title VII) (federal employee must file civil action within 30 days of EEOC or employing agency final decision).

Mr. Kline was not barred from challenging the results of the reselection process. He brought his lawsuit in the first place because, among other things, he was not satisfied with the EEO's proposed remedy for TVA's discriminatory [*10] failure to consider him for the Kingston job. Once the suit was filed in district court, TVA was under no obligation to complete the reselection process. TVA decided to go through with the reselection anyway, but the outcome of the reselection had no direct bearing on Mr. Kline's lawsuit until the district court placed its imprimatur on the reselection remedy in its order of January 28, 1992. Mr. Kline promptly amended his pleadings to complain of a discriminatory result, and this was all that was necessary to enable him to contest the result.

TVA's articulated rationale for its reselection decision is that Ms. Beckler was better qualified for the Kingston job than was Mr. Kline. Sharon Tousek, a human relations specialist with TVA's Division of Fossil and Hydro Power, worked with Mr. Cole in evaluating the candidates' qualifications. Ms. Tousek reviewed the requirements for the Kingston position and then reviewed both Mr. Kline's

resume and personal history record and Ms. Beckler's personal history record. Ms. Tousek believed that TVA's Management Appraisal System (MAS) reviews would be the best way to measure the candidates' experience and management skills. Ms. Tousek did not [*11] conduct interviews because she felt that an interview would unfairly benefit Ms. Beckler, who had served in the job for two years by the time the reselection was carried out. Mr. Cole and Ms. Tousek together decided that Ms. Beckler was better qualified for the position.

Ms. Tousek prepared a corrective action memorandum that gave the following description of the duties associated with the Kingston position:
"Planning, organizing, and implementing all Human Resource Management Activities in support of the TVA Fossil Plant to which assigned. The incumbent is responsible for the application of TVA personnel policies; procedures; union/management agreements; and achievement of objectives in the areas of recruitment, employment, classification, salary and benefits administration, labor relations, AE/EEO, and training administration. The incumbent provides advice and guidance to plant management to ensure adherence to policy and procedures." Ms. Tousek testified that she "secured the job description that was used for the selection from the [EEO] investigative record," and her corrective action report refers to an "attached" copy of the position description. The record, however, [*12] does not contain this copy. Mr. Cole likewise testified that he and Ms. Tousek used the draft job description from the original selection in carrying out the reselection. Curiously, the original EEO decision says -- twice -- that Mr. Cole stated during the EEO investigation that the draft job description had been destroyed sometime around July of 1989.

Ms. Tousek compared the MAS reports for both candidates with respect to the following categories:

recruitment and employment, salary policy and trades and labor classification systems, salary policy and trades and labor salary administration, labor relations, affirmative employment, and training. (The last category apparently relates to the training of others, not the training of the applicant.) Based on Ms. Tousek's review, Ms. Beckler appeared better qualified in three areas, Mr. Kline appeared better qualified in two, and neither candidate had qualifications in one. The corrective action report also addressed the candidates' management skills. Ms. Beckler's ratings were higher than or equal to Mr. Kline's ratings with respect to each skill over the three years evaluated. The report concluded that although neither candidate fully [*13] met the qualifications for the Kingston position, Ms. Beckler's diverse experience and consistently superior performance made her better qualified.

The corrective action report and the deposition testimony of Mr. Cole and Ms. Tousek were sufficient to eliminate the presumption of discrimination, but we do not believe they were sufficient to entitle the defendants to judgment as a matter of law. On the record before us we think a jury could disbelieve the stated reasons for preferring Ms. Beckler over Mr. Kline -- and the Supreme Court has recently told us that "the factfinder's disbelief of the reasons put forth by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." Saint Mary's Honor Center v. Hicks, 1993 U.S. LEXIS 4401, 1993 WL 220265 (U.S.), *4 (No. 92-602, June 25, 1993).

The corrective action report failed to consider the importance of several factors that distinguished the two candidates. Mr. Kline was a college graduate at the time of the original selection, and Ms. Beckler was not; the report does not discuss [*14] the plaintiff's educational advantage. Mr. Kline had acted in a management capacity for TVA for

eleven years, while Ms. Beckler had served in such a capacity for only five years. The report is silent about Mr. Kline's greater experience as a manager, and is silent about his hands-on experience as a machinist. Although TVA's decision not to conduct interviews was assertedly motivated by a desire not to favor Ms. Beckler unduly because of her experience in the job, the defendants might well have given Mr. Kline some opportunity to demonstrate experience that his MAS reports did not document. For example, the corrective action report said that Mr. Kline had no experience in salary policy and trades and labor classification systems. Mr. Kline's affidavit reveals that he did have at least some experience in such tasks. The corrective action report noted that Mr. Cole learned during Ms. Beckler's initial interview that she had some exposure to selecting employees, which demonstrates that MAS reports are not definitive statements of a TVA employee's experience and abilities.

Against this background we conclude that the question whether TVA in fact made agood faith determination that Ms. [*15] Beckler was better qualified for the job is a question that ought not to have been decided in summary judgment proceedings.

The district court's final judgment is VACATED, and the case is REMANDED for further proceedings not inconsistent with this opinion.

1993 U.S. App. LEXIS 19025 printed in FULL format.
BARBARA GIBB, Plaintiff-Appellant, v. JACK KEMP, Secretaryof the United States Department of Housing and UrbanDevelopment, Defendant-Appellee.
No. 92-6004
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
1993 U.S. App. LEXIS 19025
July 15, 1993, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 999 F.2d 539, 1993 U.S. App. LEXIS 26210.

PRIOR HISTORY: United States District Court for the Eastern District of Tennessee.
District No. 88-00022. Phillips, District Judge.

JUDGES: BEFORE: NELSON and SUHRHEINRICH, Circuit Judges; EDMUNDS, District Judge. *

* The Honorable Mancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINIONBY: PER CURIAM

OPINION: PER CURIAM. Plaintiff appeals the district court's judgment in favor of defendant in this case brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. @ 621-634 and tried without a jury. Finding that the district court's factual findings and legal conclusions were proper, we AFFIRM.

I.

Plaintiff, Barbara Gibb, is 56 years of age and a long-time employee of the federal government. She filed suit against defendant, Department of Housing and Urban Development (HUD), claiming [*2] that she was passed over for promotion on fifteen different occasions because of her age. Of the fifteen positions for which plaintiff applied, six were filled by individuals 40 years of age or older, six were filled by individuals between the ages of 30 and 40, and three were filled by individuals between the ages of 23 and 30. All of the positions at issue were filled through HUD's competitive staffing procedure. This procedure commences with a job posting describing the particular position and listing the requisite qualifications and job skills and terminates in a three-step evaluation process.

At trial, plaintiff and four other employees or former employees of HUD testified that the supervisors in the Knoxville HUD office worked in concert when filling job vacancies with young, college-educated individuals, and that William McClister, as Senior Branch Chief, either made or strongly influenced the final employment decisions. n1 Plaintiff testified that it was McClister and fellow supervisors John Robbins and Nancy Hall who conspired to deny her the disputed positions. In rebuttal, McClister, Robbins, and Hall each denied the allegations of conspiracy and discrimination and stated [*3] that plaintiff did not get hired because she was either unqualified in terms of knowledge or skills or lacking in interpersonal skills.

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n1 Plaintiff worked under the supervision of McClister in the HUD Loan Management and Property Division Branch. He was directly responsible for hiring four individuals, whose ages were 23, 25, 27, and 61.

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The trial court found as to each claim that plaintiff had established a prima facie case of discrimination, but

failed to present sufficient credible evidence to establish that the employer's proffered reasons for its hiring decisions were pretextual. The district court further found that twelve of those claims of discrimination were time-barred.

On appeal, plaintiff challenges the district court's findings on six positions, four of which the court found were time-barred.

II.

Stated most broadly, to prevail on a claim under the ADEA, a plaintiff "must prove that age was the determining factor in the employer's decision that was adverse to . . . [her]." Hawley v. Dresser Indus., Inc., 958 F.2d 720, 723 (6th Cir. 1992). [*4] As we have recently noted and reaffirmed, the McDonnell Douglas/Burdine n2 formula is the evidentiary framework applicable to both Title VII and ADEA claims. Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992) (citing Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975)). It sets forth the requirements for creating an inference or presumption of discrimination, a rebuttal of such inference, and a showing of pretext. Under this scheme, the plaintiff bears the burden of proving a prima facie case (i.e., creating a presumption of discrimination), Mitchell, 964 F.2d at 582, which may be accomplished by either of two methods. A plaintiff can establish a prima facie case by showing that (1) she was a member of a protected class; (2) she was not selected for the position at issue; (3) she was qualified for the position; (4) a person outside the protected class was hired for the position. Mitchell, 964 F.2d at 582. Alternatively, a plaintiff may establish a prima facie case by presenting credible, direct evidence of discriminatory intent. Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111 (6th Cir. 1987). [*5]

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n2 Texas Depot of Community Affairs v. Burdine, 450 U.S. 248, 255, 67 L. Ed. 2d 207, 101 S. Ct. 1089

(1981) ; McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).

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Once the plaintiff has established a presumption of discrimination, the defendant must rebut the presumption by articulating, clearly and with reasonable specificity, a legitimate, nondiscriminatory reason for its employment decision. Texas Depot of Community Affairs v. Burdine, 450 U.S. 248, 255, 258, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); Kraus v. Sobel Corrugated Containers, Inc., 915 F.2d 227, 230 (6th Cir. 1990).

The burden then shifts back to the plaintiff to prove that the defendant's proffered reason was a pretext for age discrimination. Hawley, 958 F.2d at 724. [*6] There are three ways to prove pretext: (1) by showing that the stated reason has no basis in fact; (2) by showing that the reason offered was not the actual reason; (3) by showing that the reason was insufficient to explain the employer's action. Wheeler v. McKinley Enter., 937 F.2d 1158, 1162 (6th Cir. 1991). At this point, the burden of showing pretext merges with plaintiff's "ultimate burden of persuading the court that she has been the victim of intentional discrimination." Burdine, 450 U.S. at 256. n3

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n3 Plaintiff urges the court to reject the "pretext-plus" evidentiary requirement that some courts impose on plaintiffs in age discrimination cases. See, e.g., White v. Vathally, 732 F.2d 1037, 1042-43 (1st Cir.), cert. denied, 469 U.S. 933, 83 L. Ed. 2d 267, 105 S. Ct. 331 (1984). Under this requirement, in addition to proving that employer's proffered reasons were pretextual, the plaintiff must also prove that illegal discrimination was a determining factor in the employer's decision. Plaintiff's suggestion must be rejected in light of the recent case of St. Mary's Honor Ctr. v. Hicks, 1993 U.S. LEXIS 4401, 61 U.S.L.W. 4782 (June 25, 1993) (Title VII; race discrimination). In Hicks, the Court

held that even if the employee proves pretext, she must also prove that the employer intentionally discriminated against her.

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A.

Plaintiff first claims that the district court erred in concluding that she failed to prove that defendant's hiring decisions discriminated against her based on her age. Plaintiff argues that the overwhelming weight of the evidence shows that defendant's employment decisions were motivated by age discrimination and that, therefore, she met her burden of establishing that defendant's reasons for refusing to hire her for the disputed HUD job openings were pretextual and that she met her ultimate burden of age discrimination.

Under Fed. R. Civ. P. 52(a), findings of fact by the district court shall not be set aside unless they are clearly erroneous, Alexander v. Youngstown Bd. of Educ., 675 F.2d 787, 795-96 (6th Cir. 1982), and "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Findings of the district court are not clearly erroneous unless they leave the court with the definite and firm conviction that a mistake has been made. Jackson v. RKO Bottlers of Toledo, Inc., 743 F.2d 370, 374 (6th Cir. 1984).

The gist of plaintiff's argument is that defendant's [*8] proffered reasons for refusing to promote her are unworthy of belief. It is undisputed that plaintiff introduced evidence tending to show that defendant's reasons were pretextual. The problem with this argument, however, is that defendant offered equalling compelling opposing evidence as to each of six positions challenged on appeal, evidence which the factfinder found persuasive. Because the district court's conclusions as to age discrimination were based largely on credibility determinations, and because there is adequate evidence in the record to support these conclusions, we find no basis for reversal under Rule 52(a).

B.

Plaintiff also claims that the district court erred by concluding that twelve of her fifteen alleged claims of age discrimination were time-barred under the ADEA because she failed to notify EEOC of the alleged incidents of discrimination within 180 days after they occurred, as required under 29 U.S.C. @ 633(d) .

A timely filing under @ 633(d) is a prerequisite to filing an ADEA suit, and the failure to timely file is grounds for dismissal, unless the plaintiff can establish a "continuing violation." Haithcock v. Frank, 958 F.2d 671 (6th Cir. 1992); [*9] Janikowski v. Bendix Corp., 823 F.2d 945, 948 (6th Cir. 1987) (ADEA case).

Plaintiff correctly states that Bell v. Chesapeake & Ohio Ry. Co., 929 F.2d 220 (6th Cir. 1991), upon which the district court relied, represents the legal standard under Michigan law and has no application in a federal discrimination case. Notwithstanding, the record reflects that in addition to citing and applying the Bell standard, the district court also cited and applied Haithcock v. Frank, 958 F.2d 671 (6th Cir. 1992), which sets out the appropriate test for continuing violation claims under federal law. Because the district court actually applied the Haithcock standards in reaching its conclusion, its concurrent application of the Bell standard was harmless.

Applying Haithcock, the district court concluded that defendant did not maintain a present or systematic discriminatory policy or an informal practice of age discrimination, as evidenced, in part, by the fact that six of the fifteen positions were filled by individuals over the age of 40. Absent some showing of discrimination, plaintiff's [*10] continuing violation theory must fail. See Haithcock, 958 F.2d at 677-78 (to establish continuing violation theory plaintiff must show either present discriminatory activity giving rise to a claim of continuing violation and longstanding and demonstrable policy of discrimination).

III.

For all of the reasons stated, the district court's judgment in favor of defendant is AFFIRMED.

3RD CASE of Level 1 printed in FULL format.

MAY SUN, Plaintiff-Appellant, v. ASIAN AMERICAN RECOVERY SERVICES, INC., Defendant-Appellee.

No. 92-15067

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1993 U.S. App. LEXIS 22886

April 14, 1993, Argued, Submitted, San Francisco, California

September 1, 1993, Filed

NOTICE: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 5 F.3d 540, 1993 U.S. App. LEXIS 30302.

PRIOR HISTORY: Appeal from the United States District Court for the NorthernDistrict of California.

D.C. No. CV-89-02671-DLJ. D. Lowell Jensen, DistrictJudge, Presiding

DISPOSITION: AFFIRMED.

JUDGES: Before: GOODWIN, HUG, and FLETCHER, Circuit Judges.

OPINION: MEMORANDUM

May Sun ("Sun") alleges that Asian American Recovery Services, Inc. ("AARS") terminated her from her position as a substance abuse counselor because she is a woman, in violation of Title VII of the Civil Rights Act of 1964. The district court granted summary judgment in favor of AARS on the ground that Sun failed to state a prima facie case of employment discrimination. Sun appeals.

The district court had jurisdiction pursuant to 28 U.S.C. @ 1331 and 42 U.S.C. @ 20OOe-S(f)(3). We exercise jurisdiction over this timely appeal pursuant to 28 U.S.C. @ 291.

I.

We review de novo the district court's decision to grant summary judgment in favor of AARS. See Jones v. Union Pac. R.R. Co., 968 F.2d 937, 940 (9th Cir. 1992); [*2] T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir. 1987). We must determine, viewing the evidence in the light most favorable to Sun, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See Federal Deposit Ins. Corp. v. O'Melveny & Myers, 969 F.2d 744, 747 (9th Cir. 1992); Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989).

To survive summary judgment, Sun was required to allege specific facts that establish the existence of a prima facie case of discrimination. See Stallcop v. Kaiser Foundation Hosps., 820 F.2d 1044, 1050 (9th Cir.), cert. denied, 484 U.S. 986 (1987); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1409 (9th Cir. 1987); Yartzoff V. Thomas, 809 F.2d 1371, 1374 (9th Cir. 1987). To establish a prima facie case of discrimination, a plaintiff must show she is a member of a protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); [*3] Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991). Sun could have established a prima facie case by producing direct evidence of discrimination. See Palmer v. United States, 794 F.2d 534, 537 n.1 (9th Cir. 1986). In the absence of direct evidence of discrimination, Sun could have established a prima facie case of discriminatory discharge for a violation of workplace rules by demonstrating either that she did not violate the rules or that, if she did, male employees who engaged in similar acts were not punished similarly. See Green v. Armstrong, 612 F.2d 967, 968 (5th cir.), cert. denied, 449 U.S. 879 (1980) ; see also Fong v. American Airlines, Inc., 626 F.2d 759, 762 (9th Cir. 1980). The

burden then shifts to AARS to offer a legitimate reason for terminating Sun. "When the employer produces legitimate, nondiscriminatory reasons for the employment decision, the inference of discrimination is rebutted." Lindahl, 930 F.2d at 1437. The plaintiff then would have the burden of producing some evidence [*4] of "Specific facts showing that there remains a genuine factual issue for trial" and evidence "'significantly probative' as to any [material] fact claimed to be disputed." Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983) (quoting Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 445 U.S. 951 (1980)). If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated reason, summary judgment is inappropriate because it is for the trier of fact to decide which story is to be believed. n1

- - - - - - - - - - - - -Footnotes - - - - - - - - - - - - - - - -

n1 Recently, the Supreme Court held that even when the plaintiff is successful in demonstrating that the employer's proffered reason is pretextual, the factfinder is not compelled to find unlawful discrimination. St. Mary's Honor Ctr. v. Hicks, 61 U.S.L.W. 4782 (U.S. June 25, 1993) (No. 92-602). However, the factfinder may infer discrimination from the showing of pretext:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the employer's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, "no additional proof of discrimination is required."

Id. at 4784 (citation and footnote omitted). Because, as the Court in St. Mary's recognized, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without

anything more, there will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation is true. Such a question cannot be resolved on summary judgment. But see St. Mary's, 61 U.S.L.W. at 4791 (Souter, J. dissenting).

- - - - - - - - - - - - -End Footnotes - - - - - - - - - - - - - -

[*5]

As an Asian-American woman, Sun is a member of a protected class. She was terminated, and her coworkers were not. Nevertheless, the district court found Sun failed to establish a prima facie case by direct or indirect evidence. We agree. Sun's case is fundamentally weak because it is clear that she violated AARS workplace rules. Asserting a lack of memory as to her conduct is insufficient to demonstrate that she did not behave in the manner charged. Moreover, the evidence she presented regarding her coworkers fell far short of a showing that their conduct was as egregious as hers. The record discloses that these workers were subjected to disciplinary actions although admittedly less severe than those plaintiff received.

II.

We review the district court's decision to admonish Sun's counsel for refusing to allow opposing counsel to depose Sun for an abuse of discretion. See Chambers v. Masco, 498 U.S. 807, 111 S. Ct. 2123, 2138 (1991). The district court found that "Ms. Wallace clearly violated Magistrate Wilken's order . . . ." District Court Order at 20. There is ample evidence in the record to support such a finding. Thus, [*6] we conclude that the district court's reprimand was not an abuse of discretion.

As the district court's decision to reprimand Ms. Wallace and not to impose any further sanction against her was not an abuse of discretion, AARS' request for sanctions is denied.

AFFIRMED.

1993 U.S. App. LEXIS 21631 printed in FULL format.
DARRELL CARD, Plaintiff-Appellant, v. HERCULES INCORPORATED
and JOHN DOES I-X, Defendants-Appellees.
No. 92-4169
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
1993 U.S. App. LEXIS 21631
August 19, 1993, Filed

NOTICE: [*1] THIS ORDER AND JUDGMENT HAS NO PRECEDENTIAL VALUE AND SHALL NOT BE CITED, OR USED BY ANY COURT WITHIN THE TENTH CIRCUIT, EXCEPT FOR PURPOSES OF ESTABLISHING THE DOCTRINES OF THE LAW OF THE CASE, RES JUDICATA, OR COLLATERAL ESTOPPEL. 10TH CIR. R. 36.3.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 5 F.3d 545, 1993 U.S. App. LEXIS 31755.

PRIOR HISTORY: D.C. No. 90-CV-613G. D. Utah

DISPOSITION: The judgment of the United States District Court for the District of Utah is AFFIRMED.

JUDGES: Before McKAY, Chief Judge, SETH, and BARRETT, Circuit Judges.

OPINIONBY: ENTERED FOR THE COURT;
JAMES E. BARRETT

OPINION: ORDER AND JUDGMENT *

- - - - - - - - - - - - -Footnotes - - - - - - - - - - - - - - - - - -

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

- - - - - - - - - - - -End Footnotes - - - - - - - - - - - - - - - - -

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See

Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff-appellant [*2] Darrell Card brought this action against his former employer, defendant-appellee Hercules, Incorporated, under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. @@ 621-634, and section 510 of the Employment Retirement Income Security Act (ERISA), 29 U.S.C. @ 1140. The complaint also stated causes of action under state law for breach of implied employment contract and public policy wrongful discharge. n1 The district court granted summary judgment to Hercules on plaintiff's ADEA and ERISA claims. We affirm.

- - - - - - - - - - - -Footnotes - - - - - - - - - - - - - - - - - -

n1 At the time of oral argument on Hercules' motion for summary judgment, counsel for plaintiff stipulated to the dismissal of the state law claims.

- - - - - - - - - - - - - -End Footnotes - - - - - - - - - - - - - -

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court under Fed. R. Civ. P. 56(c). Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). The [*3] court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Russillo v. Scarborough, 935 F.2d 1167, 1170 (10th Cir. 1991). We must review the evidence in a light most favorable to the nonmoving party. Id. "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241.

Plaintiff had worked for numerous employers during his engineering career. At the time plaintiff was hired by Hercules as a manufacturing engineer in January 1984, he had been employed with Ford, Bacon, and Davis in Salt Lake City for approximately ten years. When he made this

last job change, plaintiff was fifty-seven years old. Five years later, at age sixty-two, Hercules terminated plaintiff's employment as part of a reduction-in-force (RIF). Plaintiff f contends that his selection for termination was influenced by his age and Hercules' desire to limit his retirement benefits. Plaintiff [*4] claims that Hercules continued to advertise for and hire engineers following this RIF, but refused to consider plaintiff for the open positions. He further asserts that Hercules subsequently hired several manufacturing engineers who were younger than plaintiff.

In response, Hercules contends that the RIF was an economic necessity, that plaintiff was among thirty-nine employees who were terminated in this work force reduction, and that plaintiff's selection for layoff was a result of his low seniority and the elimination of the Facilities Planning Group of which plaintiff was a member. Hercules denies that plaintiff's age or benefits status were in any way influential in its decision. As to the engineers hired by Hercules subsequent to plaintiff Is termination, although admittedly younger, all were hired at a level lower than that held by plaintiff. In addition, Hercules asserts, and the recently hired engineers confirm in supporting affidavits, see Appellant's App. at 38-59, that in addition to being hired for lower paying positions, all those hired had specialized computer and recent "hands on" engineering experience which plaintiff does not possess.

ADEA Claim

"The framework [*5] for assessing the evidence in an age discrimination case parallels that applicable in a Title VII case." Spulak v. K Mart Corp., 894 F.2d 1150, 1153 (10th Cir. 1990). The plaintiff must first establish a prima facie case by showing that (1) he was within the protected age group, (2) he was doing satisfactory work, (3) he was discharged, and (4) he was replaced by a younger person. MacDonald v. Eastern Wyo. Mental Health Ctr., 941 F.2d 1115, 1119 (10th Cir. 1991). Once the plaintiff has

established a prima facie case, the burden of production then shifts to the employer to show a legitimate, nondiscriminatory reason for its action. Texas Depot. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The ultimate burden of proof remains with the plaintiff, however, who may meet the employer's proffered reasons directly with evidence of discrimination or indirectly with evidence that the employer's reason was a mere pretext for discrimination. Spulak, 894 F.2d at 1154.

In a recent decision, St. Mary's Honor Center v. Hicks, No. 92-602, 1993 WL 220265 (U.S. [*6] June 25, 1993), the Supreme Court elucidated and refined the plaintiff's burden of proof in a Title VII case, holding that once an employer meets its burden of production, the presumption of discrimination raised by the prima facie case drops out and plaintiff has the ultimate burden of proving that the employer's actions were not motivated by its proffered reasons, but by unlawful discrimination. Id. at *5. Thus, the court concluded, the plaintiff cannot simply prove that the employer's proffered reasons for its action are false, but must offer evidence that the action was actually the result of unlawful discrimination. Id. at *7; see also EEOC v. Flasher Co., 986 F.2d 1312, 1319 (10th Cir. 1992) ("Plaintiff must prove that the disparity in treatment was based upon the plaintiff's [minority status] rather than upon either a valid nondiscriminatory reason or upon no particular reason at all.").

In its order, the district court does not make any findings regarding whether it concluded that plaintiff established a prima facie case of age discrimination. However, it is undisputed that plaintiff is in the protected age group, that his work had been [*7] satisfactory, and that he was terminated. Therefore, the only element in question is whether a younger person was hired to replace plaintiff following his discharge.

Hercules states that plaintiff was an "engineer 5," which was the highest paid class of engineers employed by Hercules. Plaintiff presented evidence that Hercules continued to hire engineers after he was laid off, refused to consider him for rehire, and that several of those hired were younger than plaintiff. However, he failed to establish that anyone was hired in an "engineer 5" position or that anyone was hired to fill his particular position. The engineers hired after plaintiff was terminated, although admittedly younger than plaintiff, were hired in "engineer 2" and "engineer 3" positions. Hercules claims that not only were these positions lower in status and pay than the position previously held by plaintiff, but required advanced computer skills and recent "hands on" engineering experience which plaintiff lacked. Therefore, plaintiff's prima facie case falters on the fourth element.

However, even if we were to assume that plaintiff established a prima facie case, Hercules proffered legitimate, nondiscriminatory [*8] reasons for his layoff which plaintiff failed to rebut: the workforce reduction was a fiscal necessity; thirty-nine employees were laid off, focusing on those with the least seniority; and plaintiff's job was being eliminated with the elimination of the "Facilities Planning" group due to a lack of work in the facility planning area. n2 Plaintiff presented no evidence that these reasons advanced by Hercules were pretextual or that his age was an influencing factor in Hercules' decision. See Hicks, 1993 WL 220265, at *7 (holding that a plaintiff not only has the burden of proving the employer's reasons were pretextual, but that discrimination was the real motivation). Therefore, the evidence presented by plaintiff is insufficient to raise a fact issue under the applicable standard, and Hercules is entitled to judgment as a matter of law on plaintiff's ADEA claim.

- - - - - - - - - - - - - -Footnotes - - - - - - - - - - - - - - - - -

n2 During the last period of plaintiff's employment with Hercules, he was apparently doing busy work such as writing poetry, memorizing Shakespeare, and other personal pursuits. Appellant's App. at 173-212. None of his work activities were chargeable to projects, but had to be absorbed by overhead.

- - - - - - - - - - - - -End Footnotes - - - - - - - - - - - - - -

[*9]

ERISA Claim

The court also correctly granted summary judgment to Hercules on plaintiff is ERISA claim. Section 510 of ERISA prohibits employers from taking any action against an employee who participates in a pension benefits plan for "the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. @ 1140. In order to recover under this ERISA provision, plaintiff must show that Hercules had specific intent to interfere with plaintiff's pension benefits. See Phelps v. Field Real Estate Co., 991 F.2d 645, 649 (10th Cir. 1993) (holding that a plaintiff is required to prove by a preponderance of the evidence that adverse action of employer was motivated by intent to interfere with ERISA-protected employee benefits); Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3d Cir.), cert. denied, 484 U.S. 979 (1987) (holding that the evidence must be specific and must allow factfinder to find that one of the employer's motives was to violate ERISA).

Hercules contends that it was solicitous of the [*10] fact that plaintiff needed to remain employed for five years in order for his pension to vest and denies that its decision to terminate plaintiff was motivated by a desire to save the increase in pension which would accrue to plaintiff if he remained employed. It would appear that plaintiff is receiving a pension, albeit less than he might have received had he retired some time in the future. Contrary to plaintiff's assertion, the fact that he would have received a

more generous pension if he had worked longer does not establish an intent on the part of Hercules to interfere with his pension benefits.

The courts may look to circumstantial evidence to prove intent, Phelps, 991 F.2d at 649, but here, plaintiff offered little more than speculation in an attempt to establish that Hercules intended to interfere with his pension benefits.

Consequently, the district court also correctly granted summary-judgment to Hercules on plaintiff's ERISA claim.

The judgment of the United States District Court for the District of Utah is AFFIRMED.

Entered for the Court

James E. Barrett, Senior Circuit Judge

Supreme Court, U.S.
FILED
MAR 18 1994
OFFICE OF THE CLERK

No. 93-1297

In The

Supreme Court of the United States

October Term, 1993

THEODORE L. LeBLANC,

Petitioner,

v.

GREAT AMERICAN INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

KALVIN M. GROVE
Counsel of Record
JOEL W. RICE
FOX AND GROVE, CHARTERED
311 South Wacker Drive
Suite 6200
Chicago, Illinois 60606-6622
(312) 876-0500

Counsel for Respondent
Great American Insurance Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly ruled that plaintiff had not adduced sufficient evidence for a reasonable factfinder to conclude that Great American's legitimate business explanation for plaintiff's discharge was a pretext for age discrimination.

2. Whether the Court of Appeals should have considered plaintiff's statistical evidence under a disparate impact theory, although plaintiff never advanced such theory before the Court of Appeals in this individual discharge case alleging disparate treatment on account of plaintiff's age.

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

All parties to the proceeding below are reflected in the case caption. In accordance with Supreme Court Rule 29.1, Respondent Great American Insurance Company makes the following disclosure:

1. Parent companies:

   American Financial Corporation
   Great American Holding Corporation

2. Subsidiaries (except wholly owned subsidiaries):

   Penn Central Corporation
   American Annuity Group, Inc.
   American Financial Enterprises, Inc.
   General Cable Corporation
   Great American Communication Company

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No. 93-1297

In The

Supreme Court of the United States

October Term, 1993

THEODORE L. LeBLANC,

Petitioner,

v.

GREAT AMERICAN INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent, Great American Insurance Company ("Great American"), respectfully prays that this Court enter an order denying the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit filed by the Petitioner, Theodore L. LeBlanc ("LeBlanc").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 6 F.3d 836. Petitioner's App. 1a-30a.[1] The Court of Appeals denied LeBlanc's petition for rehearing in an order entered on October 25, 1993. App. 34a-35a. The District Court ruled from the bench on November 2, 1992. App. 36a-39a.

JURISDICTION

Great American concurs that jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. LeBlanc's Discharge[2]

Great American is an all lines insurance company with headquarters in Cincinnati, Ohio. In October 1990, when Great American discharged LeBlanc, it was divided into four geographic zones: Northeast, South, Midwest, and West. Great American was also divided into personal

---

[1] References to Petitioner's Appendix will be abbreviated as "App." followed by the page numbers. References to the Joint Appendix filed with the Court of Appeals will be abbreviated as "A" followed by the page number.

[2] LeBlanc's "Statement of the Case" focuses almost exclusively on peripheral matters which are either immaterial or simply erroneous. Great American will further address LeBlanc's erroneous factual contentions, where relevant, in the argument section of this response.

or commercial lines of insurance business. At the time of his discharge, LeBlanc was employed in the Northeast Zone, commercial lines. Al Conte, the President of the Northeast Zone, commercial lines, was nearly 60 years old at the time he discharged LeBlanc. App. 6a-7a, 25a.

Great American hired LeBlanc in October 1980, as a branch manager for its Wheaton, Maryland office. LeBlanc was then 49 years old. App. 6a. Conte, at that time Vice President in charge of regional offices, interviewed LeBlanc and concurred in the decision to hire him. A56-57; A13-14. From 1980 through 1988, LeBlanc worked for Great American in Wheaton and then Silver Springs, Maryland. App. 6a-7a; A53-54. In January 1989, at the age of 57, LeBlanc consented to a transfer to eastern Massachusetts to serve as a commercial lines Agency Operations Representative ("AOR"). Conte, by then President of the Northeast Zone, commercial lines, approved LeBlanc's transfer, as well as LeBlanc's accompanying 16% pay raise. App. 7a.

LeBlanc joined Charles DeMartino, then 56 years old, as one of two AOR's in eastern Massachusetts. As an AOR, LeBlanc was expected to market Great American commercial lines business to independent insurance agents or brokers in eastern Massachusetts and to service those agents and brokers who were already selling Great American's commercial lines insurance. LeBlanc and DeMartino, who were nearly identical in age, were the only AOR's servicing eastern Massachusetts agents until LeBlanc's discharge. App. 7a. Some of the remaining, less profitable eastern Massachusetts agents were serviced by phone or mail from the Lancaster, Pennsylvania branch office. A57.

In August 1990, Al Conte was first advised by Thomas Hayes, Executive Vice President of Great American in Cincinnati, that, due to the worsening financial situation in the Northeast Zone, Conte would have to submit a leaner budget to corporate headquarters. Although Conte sought to reduce expenses without cutting personnel, he determined in late September 1990, that some personnel cuts would be required. Accordingly, in mid-October 1990, Conte decided to eliminate or leave vacant five positions: (1) AOR, eastern Massachusetts, terminating LeBlanc, age 58; (2) Profit Center Manager, Hartford, terminating Dwight Bowie, age 38, whose duties were assumed by Robert McGuigan, age 59; (3) Senior Staff Underwriter, terminating William St. George, age 47; (4) AOR Manager, Syracuse, New York, a position vacated by the resignation of Tim Johnson, age 26; and (5) a Hartford, Connecticut underwriting position which had been vacant for some time. App. 7a-8a; A59-60. Thus, only two of the five job eliminations affected individuals over the age of forty.

Great American selected LeBlanc's position, in particular, for a number of interrelated, business reasons. Massachusetts was very unprofitable due to a downturn in the region's economy, high fixed expenses and state residual assessments against Great American's workers' compensation and commercial automobile lines of insurance. These residual assessments, or pooling requirements, exceeded $1 million annually in Massachusetts. App. 18a; A58, 60-61. In addition, eastern Massachusetts was an extremely small geographic area (in contrast to the other Northeast Zone territories) which was already being serviced by two experienced AOR's, LeBlanc and

DeMartino. Therefore, Conte believed that eastern Massachusetts would be the least damaged by the elimination of a full-time AOR position. Finally, Conte chose to retain DeMartino (just six months younger than LeBlanc), rather than LeBlanc, because DeMartino had a longer tenure in Massachusetts and a claims background which provided Great American with greater versatility in the event of hurricanes, storms or floods. App. 19a.

On October 19, 1990, Great American representatives met with LeBlanc and informed him that his AOR position had been eliminated. At that meeting, LeBlanc was told that the decision was based on budget constraints, not his individual performance. App. 8a; A32. DeMartino, the remaining eastern Massachusetts AOR, was immediately assigned responsibility for LeBlanc's most productive agents. The remaining agents were assigned to various underwriters in the Lancaster branch office to which LeBlanc and DeMartino had reported. App. 8a. Over nine months later, in July of 1991, after Conte's retirement, Great American transferred responsibility for eastern Massachusetts from the Lancaster office to Windsor, Connecticut. As a temporary measure to ease the transition for the affected agents, Great American assigned a 30 year old Connecticut AOR, Anne Daley, to service several eastern Massachusetts agents. Between July and September 1991, Daley serviced a few of LeBlanc's former agents in addition to her existing agents in western Massachusetts, which was not part of LeBlanc's former territory. Daley left Great American in September 1991 and, since then, DeMartino has been the only AOR servicing agents in eastern Massachusetts. App. 8a-9a.

B. Proceedings Below

LeBlanc filed suit alleging that, in discharging him, Great American had violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA") and state discrimination laws.[3] Great American moved for summary judgment which was granted by the District Court on the grounds that LeBlanc's evidence was insufficient as a matter of law either to make out a prima facie case of age discrimination or, alternatively, to rebut the "age neutral ground for discharge" proffered by Great American. App. 38a. LeBlanc appealed. The Court of Appeals questioned whether LeBlanc's evidence was sufficient to even make out a prima facie case. *LeBlanc v. Great American Insurance Company*, 6 F.3d 836, 844 (1st Cir. 1993). After assuming, without deciding, that LeBlanc had established a prima facie case, the court held that Great American had "articulated a legitimate, non-discriminatory reason for LeBlanc's dismissal." 6 F.3d at 844. Thus, noted the court, "the presumption of age discrimination raised by LeBlanc's prima facie case" vanished and the court was left to determine "whether the evidence in its entirety, would permit a reasonable factfinder to infer that Great American's decision to terminate LeBlanc was motivated by age animus." *Id.* at 845.

The Court of Appeals examined LeBlanc's evidence of pretext and his statistical evidence, concluding that "LeBlanc's arguments are based largely upon conclusory allegations, improbable inferences, and unsupported

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[3] LeBlanc initially filed suit in the Eastern District of Pennsylvania. This case was transferred to the District of Massachusetts on October 30, 1991.

speculation." *Id.* at 849. In particular, the court considered in detail each of LeBlanc's attacks on Great American's explanation and found that none raised triable issues of fact as to whether that explanation was a sham or pretext. *Id.* at 845-47. Furthermore, the court agreed with the District Court that LeBlanc's statistical evidence was insufficient, as a matter of law, to raise an inference as to age discrimination "[i]n a disparate treatment case such as LeBlanc's. . . . " *Id.* at 848. As the court observed, the statistics were riddled with flaws and there was "no evidence whatsoever to connect the statistics to Great American's specific decision to dismiss LeBlanc." *Id.* Thus, contrary to LeBlanc's repeated and unsupported contention, the result below did not turn on any purported requirement that LeBlanc present "independent evidence of discriminatory animus."

REASONS FOR DENYING THE WRIT

Review by this Court of the decision below is neither necessary nor warranted. LeBlanc's principal argument is that there are conflicts between the decision of the Court of Appeals and other recent circuit court decisions regarding the evidentiary standard applicable to summary judgment in light of this Court's decision in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993). Petition, pp. 12-25. These purported conflicts are illusory for several reasons. *First*, the Court of Appeals' decision is not inconsistent with the rationale of this Court's decision in *Hicks*. To the contrary, in complete conformity with *Hicks*, the Court of Appeals merely held

that the evidence in its entirety, including LeBlanc's evidence of pretext, must be sufficient to raise a genuine factual issue as to whether his discharge was motivated by age-based animus. *Second*, upon closer examination, the purported "confusion" in the circuit courts presents no conflict which this Court need resolve. At minimum, it is premature for this Court to address alleged conflicts, if any, within individual circuits or predicated upon unpublished, non-precedential circuit court rulings. *Third*, and perhaps most importantly, it is unnecessary for this Court to address any purported conflicts because the Court of Appeals clearly found no genuine factual dispute as to whether Great American's explanation for LeBlanc's discharge was pretextual. Therefore, it is unnecessary to determine in this case whether the so-called "pretext plus" standard survives *Hicks*. In addition to the lack of conflicts requiring resolution by this Court, the decision below does not raise any important federal question. LeBlanc's disagreement with the Court of Appeals' interpretation of the evidence presented under the unique circumstances of this case is of no public significance.

LeBlanc's alternative contention, that the Court should decide whether plaintiffs may prove age discrimination under a disparate impact theory, is obviously makeweight and raises no issue requiring review by this Court. Petition, pp. 25-32. The disparate impact theory was never raised by LeBlanc in the proceedings below and was, hence, waived. In any event, a disparate impact theory is obviously inapplicable to these facts, as evidenced by LeBlanc's own arguments elsewhere in the Petition.

A. The Decision Below Does Not Conflict With This Court's Decision In *St. Mary's Honor Center v. Hicks*

LeBlanc's contention that the Court of Appeals' decision is at odds with this Court's holding in *Hicks* mischaracterizes both *Hicks* and the nature of the decision below. Petition, p. 25. In *Hicks*, a lawsuit alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, this Court was confronted with the narrow issue of whether "the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff." 113 S. Ct. at 2746. The Court held that the factfinder's rejection of the defendant's proffered reasons does not compel a judgment for the plaintiff. *Id.* at 2749. As the Court observed, the familiar *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), scheme for allocating the burden of production does not alter plaintiff's " 'ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.' " *Id.* at 2747, quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Once the employer comes forward with a lawful explanation for its actions, the presumption of discrimination "simply drops out of the picture" and "the trier of fact proceeds to the ultimate question" of whether the employer discriminated against plaintiff. *Id.* at 2749.

Although *Hicks* arose on appeal from a bench trial, the Court of Appeals below recognized that its rationale also applies in the summary judgment setting. As the Court of Appeals observed, "once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before

becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age." *LeBlanc*, 6 F.3d at 843. In other words, the employee has the burden of establishing a genuine factual issue as to whether "the reason advanced by the employer for the adverse employment action constituted a mere pretext for unlawful age discrimination." 6 F.3d at 842. After a detailed examination of LeBlanc's purported evidence of pretext and the statistical evidence he proffered (*id.* at 845-49), the Court of Appeals concluded that "LeBlanc has adduced insufficient evidence for a reasonable trier of fact to infer that Great American's decision to terminate his employment in October 1990 was motivated by age animus." *Id.* at 849.

Contrary to LeBlanc's assertion, the Court of Appeals' decision is completely consistent with this Court's holding and rationale in *Hicks*. LeBlanc interprets this Court's statement in *Hicks* that "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination" (113 S. Ct. at 2749), as barring summary judgment whenever there is a factual dispute over the employer's explanation. The language of *Hicks* does not support such an interpretation.[4] As the Court emphasized later in *Hicks*,

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[4] The remainder of the *Hicks* quotation relied upon by LeBlanc clarifies the Court's reasoning on this point: "The factfinder's disbelief of the reasons put forward by the defendant (*particularly if disbelief is accompanied by a suspicion of mendacity*) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* at 2749 (emphasis added). Thus, at best, disbelief of an employer's explanation

"nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Id.* at 2751. It therefore follows, in accordance with *Hicks*, that once the employer proffers a lawful reason for its action, the plaintiff must at least raise a genuine factual dispute as to the ultimate required finding of discrimination. That is all the Court of Appeals here required. It did not insist upon any particular form of direct or indirect evidence of age discrimination. Rather, it merely reasoned that all LeBlanc's evidence (including his evidence of pretext) must raise a genuine factual dispute as to the ultimate issue of discrimination. There is thus no conflict between the rationale of *Hicks* and the decision below.

B. The Decision Below And The Decisions Of Other Circuit Courts Do Not Present A Conflict Which This Court Must Resolve

1. The Purported Conflicts Among The Circuit Courts Are Illusory, Or, Alternatively And At Minimum, It Would Be Premature For This Court To Address Alleged Conflicts

LeBlanc repeatedly refers to "conflicts" or "confusion" among the circuit courts over how to apply *Hicks* to the summary judgment setting. Petition, pp. 11, 15, 20, 25. In particular, LeBlanc contends that after this Court's

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may or may not support a finding of discrimination. Obviously, this will depend upon the state of the entire record and the inferences which can be fairly drawn by a reasonable factfinder.

decision in *Hicks* one line of cases follows the so-called "pretext only" approach to resolution of summary judgment motions,[5] while another line of cases adheres to the so-called "pretext plus" evidentiary standard.[6] Close examination of these authorities reveals that the purported conflicts are illusory. *First*, the majority of the cases LeBlanc cites are not even remotely pertinent.[7] *Second*, the fact that courts may emphasize different aspects

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[5] The "pretext only" cases, according to LeBlanc, include *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993); *Mitchell v. Data General Corp.*, 12 F.3d 1310 (4th Cir. 1993); *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392 (6th Cir. 1993); *Kline v. Tennessee Valley Authority*, 1993 U.S. App. LEXIS 20286 (6th Cir. 1993) (not recommended for publication or citation pursuant to Sixth Circuit Rule 24); *McNabola v. Chicago Transit Authority*, 10 F.3d 501 (7th Cir. 1993); *Bojda v. Black Dot Graphics, Inc.*, 1994 U.S. App. LEXIS 117 (7th Cir. 1994) (non-precedential order pursuant to Seventh Circuit Rule 53); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993); *May Sun v. Asian American Recovery Services*, 1993 U.S. App. LEXIS 22886 (9th Cir. 1993) (non-precedential opinion pursuant to Ninth Circuit Rule 36-3); and *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993).

[6] In addition to the decision below, LeBlanc refers to the following as "pretext plus" cases: *Bodenheimer v. PPG Indus.*, 5 F.3d 955 (5th Cir. 1993); *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292 (5th Cir. 1994); *Gibb v. Kemp*, 1993 U.S. App. LEXIS 19025 (6th Cir. 1993) (not recommended for publication under Sixth Circuit Rule 24); *Booker v. C.R. Indus.*, 1993 U.S. App. LEXIS 31886 (7th Cir. 1993) (not recommended for publication or citation under Seventh Circuit Rule 53) and *Card v. Hercules, Inc.*, 1993 U.S. App. LEXIS 21631 (10th Cir. 1993) (not precedential pursuant to Tenth Circuit Rule 36.3).

[7] Several of the alleged "pretext only" cases are, in fact, indistinguishable from the decision below. *E.g., Mitchell, supra* (court affirms summary judgment for employer finding no factual dispute as to the employer's explanation for plaintiff's discharge); *Bojda*, 1994 U.S. App. LEXIS at *12 (court affirms

of this Court's rationale in *Hicks* in order to justify the result in specific cases is neither troublesome nor does it warrant intervention by this Court. For example, *Roush*, *Washington* and other so-called "pretext only" cases, unlike here, found substantial evidence of pretext. Indeed, several cited direct evidence of discrimination.[8] On the other hand, none of the so-called "pretext plus" cases even found a genuine factual dispute as to the employer's explanation. In other words, LeBlanc cites to no circuit court decision which has ever upheld summary judgment in the face of material factual disputes as to the employer's explanation. Thus, contrary to LeBlanc's

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summary judgment for employer in ADEA case finding that the employer's explanation was not a pretext for age discrimination). Other cases do not squarely address how *Hicks* applies to summary judgment proceedings. *E.g.*, *DeMarco*, 4 F.3d at 172 (court reverses summary judgment in ADEA case on narrow ground that ADEA applies to religious institutions, without reaching the merits of the underlying ADEA claim); *Hairston*, 9 F.3d at 921 (court reverses summary judgment in ADEA case, based not upon *Hicks*, but upon court's view that summary judgment is generally unsuitable in Title VII cases once prima facie case is established). Finally, many of the authorities on which LeBlanc relies are procedurally distinguishable. *McNabola*, *supra* (appeal from jury verdict in race discrimination suit); *Roush*, *supra* (appeal after jury verdict in ADEA case); *Barrow*, *supra* (court affirmed summary judgment for employer in ADEA case on separate ground that no prima facie case was even established) and *Gibb*, *supra* (review of bench trial decision under clearly erroneous standard, with deference paid to trial court's credibility determinations).

[8] *Roush*, 10 F.3d at 396 (court cites age-related remarks such as "old bag" or "old gummer"); *Washington*, 10 F.3d at 1434 (direct evidence of racial discrimination shown by testimony regarding racial tension).

assertions, there is simply no irreconcilable conflict among the circuit courts as to whether, in the event of a factual dispute as to the employer's explanation, summary judgment is warranted.

Alternatively, and at minimum, it would be premature for this Court to address the conflicts, if any, alleged by LeBlanc. Six of the supposedly conflicting authorities are decisions which have been expressly designated by the applicable circuit court rules as non-precedential and non-binding. See cases listed in footnotes 5 and 6, *supra*. The circuit courts in question may well modify or completely alter their views in later, published decisions, obviating the need for review by this Court. Thus, any finding of conflict based upon such non-precedential decisions would be premature. Furthermore, if there are conflicts *within* individual circuits, as LeBlanc contends, it would likewise be premature for this Court to intervene. There are other avenues available for resolution of intra-circuit conflicts, if any, including *en banc* review.

2. It Is Unnecessary To Resolution Of This Case To Even Address Purported Conflicts In The Circuits

Even assuming, *arguendo*, that LeBlanc has identified some conflict among the circuits as to the summary judgment standard post-*Hicks*, this case is not the proper vehicle to resolve such purported conflict. Here, despite LeBlanc's strained assertions to the contrary (Petition, p. 16), the Court of Appeals' decision did not depend upon application of a higher, "pretext plus" standard of proof.

Rather, the Court of Appeals examined LeBlanc's evidence of pretext and, in each instance, found that it raised no factual dispute as to Great American's legitimate business explanation for LeBlanc's discharge. For example, the court concluded that the layoff of only three employees did not raise any inference that "Great American's stated reasons were mendacious." 6 F.3d at 846. In addition, the court reasoned that it would require "unsupported speculation" to conclude that the previous hiring of younger AOR's elsewhere in the Zone, shed any light on Great American's explanation. *Id.* at 846. The court also found that LeBlanc had not adduced evidence from which a factfinder could reasonably conclude that Great American's explanation of financial difficulty was "a sham." *Id.* at 847. Finally, the court was not persuaded that evidence of Conte's failure to consult with other managers about LeBlanc's discharge, even if true, "undermine[d] the justifications" Great American provided for its decision, particularly where Conte, himself nearly 60 years old, had promoted LeBlanc less than two years earlier. *Id.* In sum, the question LeBlanc poses in his Petition is irrelevant because, regardless of the evidentiary standard, the Court of Appeals would have affirmed summary judgment.[9]

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[9] Indeed, although the Court of Appeals assumed, for purposes of the appeal, that LeBlanc had made out a prima facie case, "it [was] not clear" to the court that the District Court had erred in granting summary judgment on that alternative ground. *Id.* at 844. In particular, the court found unconvincing LeBlanc's evidence as to the fourth element of the prima facie case – failure to treat age neutrally or retaining younger persons in the same position. *Id.*

C. The Decision Below, Properly Construed, Does Not Raise Any Important Federal Question Requiring Resolution By This Court

LeBlanc's contention that "[r]eview of this case is vitally important to the enforcement of the nation's anti-discrimination laws" is also misguided. Petition, p. 10. His argument rests upon the erroneous premise that the Court of Appeals affirmed summary judgment for Great American based upon the lack of direct evidence of age discrimination beyond evidence of pretext. Instead, the Court of Appeals, consistent with *Hicks*, merely held that the record as a whole, including LeBlanc's supposedly "strong evidence of pretext," must permit a reasonable factfinder to conclude that Great American's explanation was a pretext for discrimination. LeBlanc's alarmist prediction that plaintiffs who successfully rebut their employer's explanation for discharge will nevertheless be deprived of jury trials is simply not borne out by precedent, as Great American has already established. The notion that circuit courts, post-*Hicks*, are upholding summary judgment in the face of material factual disputes as to the employer's explanation is a fiction invented by LeBlanc in an effort to obtain review of a result he dislikes.

LeBlanc's criticisms of the decision below would necessarily require this Court to review individualized factual determinations which are of no significance to other cases. This is apparent from LeBlanc's Petition, which is replete with detailed quibbles over the Court of Appeals' interpretation of his evidence. LeBlanc contends that the Court of Appeals "sid[ed] with Respondent with respect

to each and every disputed issue of fact and the inferences to be drawn therefrom." Petition, p. 9. To the contrary, as already noted, the Court of Appeals found no material "disputed issues of fact" lurking in LeBlanc's conclusory and improbable assertions. He later asserts that the Court of Appeals' "rationale was strained and often at odds with common sense." Petition, p. 23. As the Court of Appeals recognized, it was LeBlanc's thesis (based upon a misleading and inaccurate reading of the record) that Conte, the decisionmaker in this case, suddenly developed an aversion to older people less than two years after promoting LeBlanc, which defied logic and common sense. In any event, LeBlanc's factual criticisms, which are ably addressed by the Court of Appeals, merely underscore the uniqueness of this case and its utter lack of broader legal significance.[10]

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[10] LeBlanc's critique of the decision below (Petition, pp. 4-7, 23-24) contains numerous misleading or factually inaccurate statements. *First*, LeBlanc's statement (Petition, p. 23) that at some point in 1991 the total number of employees was the same as in 1990 distorts the undisputed fact that in the fall of 1990 Conte eliminated five positions laying off three individuals. *Second*, LeBlanc's reference (Petition, p. 23) to Great American advertising to fill fourteen positions in the fall of 1990 is blatantly and deliberately misleading. Most of those positions were not even in commercial lines and, thus, were outside Conte's control or budget. The others were positions already in the budget for which LeBlanc was ineligible. A96-97. *Third*, LeBlanc's contention (Petition, pp. 5-6) that eastern Massachusetts was profitable by some measures is demonstrably false. LeBlanc deliberately relies upon records he knows reflect Great American's personal lines performance, not just the commercial lines performance narrowly relevant to this lawsuit. Those same records also fail to account for the onerous residual assessments imposed by the state of Massachusetts. A94-95. *Finally*,

D. The Court Of Appeals Was Not Obligated To Consider LeBlanc's Statistical Evidence Under A Disparate Impact Theory Never Raised Below And Patently Inconsistent With LeBlanc's Theory Of The Case

LeBlanc also contends that the Court of Appeals erred by not considering his statistical evidence under a disparate impact theory. Petition, p. 25.[11] Even if, as LeBlanc asserts (Petition, pp. 25-26), this Court has never resolved whether a disparate impact theory is available in an ADEA case, the issue is not ripe for review because LeBlanc concededly never raised it below. As this Court observed in *Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988), "[t]his Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *See also, Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court"). The circuit court decisions on which LeBlanc relies are factually distinguishable. *MacPherson v. University of Montevallo*, 922 F.2d 766, 769 n. 1 (11th Cir. 1991) (court notes that plaintiffs had always based their ADEA case on both disparate treatment and disparate impact

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LeBlanc's repeated references to the hiring of AOR's in other portions of the Zone (Petition, pp. 6-7, 23) obscure the critical, undisputed fact that no one additional was hired once Conte was told to cut the budget in August, 1990. A96.

[11] LeBlanc concedes that statistical evidence has little bearing on a disparate treatment case because "statistical evidence tends to address a pattern and practice and not the specific reason offered by the employer for its actions with respect to one employee." Petition, p. 28.

theories) and *Sobel v. Yeshiva University*, 839 F.2d 18, 24-25 (1988), *cert. denied*, 490 U.S. 1105 (1989) (record shows that plaintiff's disparate impact claim "was raised well in advance of trial"). Here, by contrast, it would be patently unfair to permit LeBlanc to raise this theory of recovery for the first time in this Court.

Even if LeBlanc is not procedurally barred from raising this issue, a disparate impact theory clearly does not apply to this case. LeBlanc attempts to have it both ways. As he concedes, in a disparate treatment case "the credibility of the reason advanced by the employer for its actions is the critical issue." Petition, p. 26. He argues repeatedly in the first half of his Petition that Great American's explanation for his discharge lacked credibility. Petition, pp. 12-25. Yet in the second half of his Petition, LeBlanc characterizes that same explanation as "facially neutral." Petition, p. 26. The two positions are logically irreconcilable. It is plain that LeBlanc does not contend a neutral policy adversely affected him and other older employees. Rather, he claims that the specific decision to terminate him was motivated by age bias. Accordingly, it was not error for the Court of Appeals to consider this a disparate treatment case.

CONCLUSION

For all of the foregoing reasons, Great American respectfully requests that this Court deny LeBlanc's Petition for a Writ of Certiorari to the First Circuit Court of Appeals.

Respectfully submitted,

KALVIN M. GROVE
Counsel of Record
JOEL W. RICE
FOX AND GROVE, CHARTERED
311 South Wacker Drive
Suite 6200
Chicago, Illinois 60606-6622

Counsel for Respondent
Great American Insurance Company